OFFICE OF NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

RESTRICTION OF RETAIL PRICE CUTTING WITH EMPHASIS ON THE DRUG INDUSTRY

By
Mark Merrell

and
E. T. Grether Summer S. Kittelle

WORK MATERIALS NO. 57

TRADE PRACTICE STUDIES SECTION
March, 1936

OFFICE OF NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

RESTRICTION OF RETAIL PRICE CUTTING
WITH EMPHASIS ON THE DRUG INDUSTRY

By
Mark Merrell

and
E. T. Grether Sumner S. Kittelle

Acknowledgement is made to Mr. George Feldman for his report on the legal aspects of resale price maintenance; to Mr. Harry S. Kantor and Miss Anne Golden for their preparation of the summary, the general discussion of state fair trade laws, the appendix on techniques for the study of prices in newspaper advertising, and for detailed suggestions at all stages of the work; to Mr. Wroe Alderson for comment and criticism; and to Miss Anna Vana for her efficient co-ordination of the secretarial and clerical details involved in the preparation of the report.

TRADE PRACTICE STUDIES SECTION
March, 1936

FOREWORD

This study of restrictive price control devices in retail trades was prepared by Mark Merrell of the Trade Practice Studies Section, Corwin D. Edwards in charge.

This report presents principally a history of the inception and development of the resale price maintenance movement in the drug industry. The industry forces at work are portrayed in detail. The effects of the restricting devices are presented, insofar as evident, there having been inadequate time for a field and questionnaire survey. However, the forms to be used in such a survey have been developed and are presented in an appendix, together with a technique for collecting retail prices. The experience in California, which state has had permissive restrictive price control since 1931, is dealt with in greater detail, on the basis of surveys which one of the authors had instigated prior to the beginning of this report.

Sources of information were correspondence, documents and transcripts of hearings in NRA files; correspondence and conversations with trade leaders; articles in trade journals; reports of court decisions; and, for some of the purely historical matter, the personal knowledge of members of the Loss Limitation Unit gained through contact with the drug industry before and during NRA.

At the back of the report will be found a brief statement of the studies undertaken by the Division of Review.

L. C. Marshall
Director, Division of Review

March 3, 1936

TABLE OF CONTENTS

9726

* * * * * *

PART TWO

LOSS LIMITATION PROVISION OF THE RETAIL DRUG CODE

PART FOUR

INTERPLAY OF FORCES IN THE DRUG INDUSTRY SINCE 1937

and

PROPOSED FEDERAL STATUTES

SUMMARY OF FINDINGS

Economists, legislators and business men to day have a vital interest in the problem of retail price cutting and current efforts to restrict it. Little retailers, by mass action, are securing price maintenance in the form of state laws and manufacturers' price policies, and are now working toward Federal legislation to further their cause. All this is happening with little analysis of the economic and social considerations involved.

The focus of this report is on the drug industry because that industry has advocated restraint of price cutting more consistently than any other group, and has long been in the van of the price maintenance movement. As early as the beginning of this century, drug manufacturers, seeking to curb the growth of price cutting, attempted to stabilize resale prices by contracts or notices affixed to their products. When, in 1911, the United States Supreme Court, in the Miles' decision, declared such contracts in restraint of trade and void; and in another case, declared that notices on goods were not binding on distributors, many manufacturers became discouraged, but a few continued their efforts to maintain prices by other means.

The two remaining methods of resale price maintenance were refusal-to-sell and consignment selling but both were expensive and ineffective; so, while a few manufacturers experimented with these devices, the drug industry appealed to Congress for a law validating resale price contracts. Between the 68rd and 73rd Congress, thirty-three such bills came up for consideration, but none passed.

In 1933, Congress passed the National Industrial Recovery Act, and the drug industry saw a new chance for Federal price control. Manufacturers, wholesalers and retailers submitted codes, containing provisions to stop retail price cutting; but after months of negotiations, only the retailers achieved any success in their efforts; and the provision they received established a minimum price lower than they had requested. The manufacturers secured open price filing provisions in their codes but no direct price maintenance devices. The wholesalers could not devise a satisfactory price clause; and because of disputes over the labor sections of their proposed code, ended with no code at all.

The loss limitation provision in the Retail Drug Code prohibited druggist from selling below the "manufacturer's wholesale list price per dozen", a price practically equal to the small dealer's merchandise cost. Because it was easy to ascertain and fairly stable, this code price proved one of the most workable and effective in NRA; but it had its share of administrative difficulties and inherent defects.

Though evidence on the effects of the loss limitation provision is meager, it points to the probability that a larger number of prices were reduced than were raised. Two factors account for this phenomenon; first, reduction of prices by manufacturers to prevent the code from raising their consumer prices; and second, a tendency of competition to draw prices down toward the code minimum on a large number of products counterbalancing the price increases on the items previously sold as

loss leaders. The net effect of these price movements upon consumers and small retailers cannot be stated, however, since there is no evidence of the relative volume of sale of items whose prices fell and items whose prices increased.

When compliance with the loss limitation provision began to crumble (largely because of litigation difficulties) in the fall of 1934, the drug trade turned to the State legislatures for price stabilization. This movement derived inspiration from the California act permitting manufacturers and distributors to contract for the maintenance of resale prices, and requiring all retailers, whether parties to contracts or not, to abide by contract prices. This Act was the model for other state legislation; and drug groups secured its passage in Oregon, Washington, Illinois, Wisconsin, Iowa, New York, Pennsylvania, New Jersey and Maryland. Druggists in Connecticut obtained a statute indentical with the loss limitation provision of the Retail Drug Code.

The leadership of the price maintenance effort, by this time, had shifted from manufacturers to retailers. Previously, price maintenance had been a scheme of manufacturers to achieve retailer goodwill. Gradually it changed to a militant retailers' movement to force manufacturers into satisfactory price policies under threat of losing all goodwill.

Except for the California law, state price maintenance laws have been in operation for too short a time to reveal their effects. Data from California indicate that retail margins under contracts average about 31%, and that contractual prices on loss leaders have advanced about 25%. Prices in small drug stores, on the other hand, seem to have decreased slightly. The drug industry has issued more contracts than any other. Many retail grocers are ignorant of the law's existence, and grocery manufacturers have exhibited little desire to maintain prices under it.

In the present session of Congress, retail druggists have commenced a new move for Federal price maintenance legislation. One proposed bill would lift the anti-trust law ban on manufacturers' price contracts in states with price contract laws, thus obviating the necessity for manufacturers to establish a domicile in these states. Another bill would strike at manufacturers' discriminatory discounts and place the small and large dealer upon a more even competitive basis.

Because of the extent of the price maintenance problem, the present study is little more than an indication of the need for a larger work; for which work, it is hoped, the information and procedure of this report may provide useful suggestions.

INTRODUCTION (*)

Issues in the Regulation of Retail Prices

A strong effort to change the nature and extent of retail price regulation is under way in this country. A number of states have enacted laws permitting resale price maintenance and loss leader selling during the past year. Similar legislation is before legislatures in other states, and before Congress.

Proponents of restraints on price cutting urge that regulation is necessary not only for the preservation of small, individual enterprise, but also to eliminate practices injurious to the consumer. They charge that the monopolistic power of large distributing corporations is oppressing small retailers; that the great chains and department stores are exacting unearned discounts and allowances from their suppliers and are using the margin thus gained to destroy small competitors; and that manufacturers often build up consumer demand by advertising and then offer special discounts to price cutters, thereby making small retailers distribute the product at a loss. The proponents also charge that pressure on small non-cut-rate retailers comes from certain types of relatively small, aggressive cut-rate establishments.

The social usefulness of the types of price control already established or now under consideration has not been precisely evaluated. It is not known with even approximate accuracy whether a given type of price control will contract the area within which competition operates, or shift the brunt of competition to a new area, or merely change the form of the competitive practices; no estimate has been made of whether it will result in the overpayment of those engaged in performing distributive functions, or whether it will tend to curtail the total output of goods. Political pressure and rule-of-thumb judgments have decided the course of events.

The problems involved are complex, but some of the more outstanding questions are as follows:

1. Would the proposed controls eliminate conditions inimical to the public interest?

   a. Would they prevent the growth of monopoly and the unsocial use of corporate power? What shifts have been apparent in volume of business on nationally-advertised goods from large to small distributive enterprise? What, if any, trends appear toward a monopoly for large distributive enterprise through the use of private brands?

   b. Would the controls favor the continuance of small enterprise? What shifts in volume of business done by small enterprise have appeared? How have the various forms of existing control altered, favorably or unfavorably, the margins of small enterprise? Of large enterprise?

(*) By Harry S. Kantor

2. Would the proposed controls bring about other conditions inimical to the public interest?

   a. Would the consumer pay higher prices for goods? What has been the effect of existing controls on consumer prices on nationally-advertised brands? On private brands?

   b. Would the consumer have to pay for unwanted services? What price differential has been maintained between service and non-service outlets under free competition and how have existing controls altered this differential?

   c. Would price regulation protect inefficient enterprises? What political and social reasons for such protection exist? What would be the public cost? Would small retail enterprise absorb an undue share of the social income?

3. What gains and losses would the proposed controls bring to industry?

   a. What have been the effects of existing and past price controls on manufacturers? Has the manufacturer's volume of business increased or decreased? Has his margin increased or decreased?

   b. What have been the effects of existing and past controls on wholesalers? Have wholesalers' margins and volumes increased or decreased?

   c. What have been the effects of existing and past controls on retailers? What has been the effect on the relative margins and volumes of retail enterprises of different sizes, price policies, and service policies? Is there a point below which an established minimum price becomes more of a detriment than a benefit to small retail enterprise?

4. If there is to be an extension of retail price control, in what manner and to what extent should prices be controlled?

   a. Is new legislation necessary to secure the desired results? Can they be secured by the repeal of existing legislation? Would previous court decisions outlawing resale price maintenance be followed today if the courts had adequate evidence about the tactics used in retail price cutting, and the effect of these tactics? What are the limitations on refusal-to-sell and consignment selling as price maintenance devices? Does the solution lie merely in the education of small retail enterprises in sound business procedure? Would government-fostered voluntary chains achieve the protection of small enterprises through enhancing their power to compete? Would complete cartellization result from the growth of voluntary chains and is such an outcome desirable?

b. If price control legislation is necessary, should all retail prices be regulated? What is the susceptibility of various commodities to price cutting? Upon what commodities would price regulation be in the public interest, and upon what commodities inimical to the public interest?

c. Should regulation be in the form of a fixed minimum price or a formula for establishing a minimum? What was the relative effectiveness of these two types of regulation as illustrated, on the one hand, by the Retail Drug, Retail Tobacco and Retail Booksellers' Codes; and on the other, by the Retail Food and Grocery and Retail Trade Codes? How did the two types compare in enforceability, difficulty of administration, and protection to small enterprise?

d. Should regulation be in the form of mandatory or permissive legislation? If the legislation is permissive, what types of enterprise, and what proportion of each, may be expected to take advantage of it? What has been the experience in this respect under the California Fair Trade Law? What are the relative effects on prices, volumes, and margins of the two types of law, represented by the California law and the Connecticut Retail Drug Act (which follows the provisions of the Retail Drug Code)?

What is the relative enforceability of each type? How does the constitutionality bear on the last-mentioned question?

5. To what extent is the depression responsible for the present movement for price control? Would recovery correct the problems complained of by proponents of the movement? What would be the effect of the proposed price controls on industry and society during periods of good business conditions?

Would these controls, designed to prevent high mortality of enterprise during the depression, discourage the birth of new merchandising methods in other periods? Would they encourage the entrance of inefficient units during times of good business?

The solution of many of the above questions is impracticable; and the present report encompasses only a small part of the material necessary to answer the questions whether resale price maintenance should be permitted, and whether loss leader selling should cease. Some insight into the gain or loss to parties affected appears by close scrutiny of the nature of enterprises in the groups advocating and opposing the various forms of price regulation, and from analysis of their public statements. The fact that experiments in price regulation have preceded

analytical decisions on the propriety of such regulation offers an opportunity for a study of the effects in actual practice.

Insofar as the physical limitations of this study have made it possible, this report presents the data on the effects of the loss limitation provisions of the Retail Drug Code and on the effects of the resale price maintenance legislation in California. Limitations upon this study have required it to focus principally upon one industry. The drug industry was chosen because of its susceptibility to price cutting, and its long-continued advocacy of retail price maintenance. This industry's experiences under NRA are more readily available for study than those of other groups under codes, the loss limitation provision of the Retail Drug Code being an interesting example of nation-wide mandatory retail price maintenance.

Prior to NRA, the drug industry had been the principal sponsor of retail price maintenance bills before Congress and an active group in the struggle for price stabilization by manufacturers.

Since NRA the drug industry has sponsored retail price maintenance legislation in a number of states and is currently attempting to secure Federal legislation on the problem.

Thus this industry has experienced, perhaps, a wider range of retail price cutting and price maintenance problems than most industries, and offers a fruitful field for research.

PART I - INTERPLAY OF INTERESTS IN THE DRUG INDUSTRY (*)

CHAPTER I - BEFORE NRA

I. INTRODUCTION

Maneuvers for power in the Drug Industry during the NRA period gave the key to what had gone before. New business strategies were but projections of the old and had the same motivations. Developments since the code collapse seem to fall into the familiar patterns. Price maintenance did not make its first appearance in NRA codes. Various trade elements had denounced it ever since large scale business operations appeared. It had taken various forms and its compelling forces had shifted about.

An examination of the drug industry during NRA and the price provisions which appeared in the original drafts of the codes may clarify the movements and attitudes toward price stabilization. Although none of the price provisions appearing in the original proposed drug codes were approved by the Administration, they are of interest and should be carefully examined as they are indicative of the temper of the trade groups at the time. The fight to convince the Administration of the necessity for such provisions, the compromises offered by the trade, and the subsequent clauses approved by the Administration all shed light on what can be expected in any future attempt the industry may make to obtain price stabilization by legislative means. The Administration's experience with the industry under the approved, compromised price provisions probably indicates possibilities under other types of price devices that may be established in the future.

This part of the report intends to describe first the major developments in the field of price maintenance from the Miles' decision in 1911 to the passage of the National Industrial Recovery Act. A discussion of the original proposed codes for the manufacturing and wholesale branches of the drug industry follows. The proposed retail drug code receives only brief treatment here since Part II of this report covers it in detail.

After the discussion of the proposed codes comes an investigation of changes in the drafts during preliminary negotiations, and a discussion of the approved codes. Again the retail drug code receives only cursory reference because of its treatment in Part II.

Considerable material presented in this Part is written from first-hand knowledge acquired by certain members of the Unit through administering the several drug codes and from previous experience in the industry.

(*) By Mark Merrell

II. DEVELOPMENTS IN THE DRUG INDUSTRY FROM 1911 TO 1933

From 1911, when the United States Supreme Court handed down the Miles' decision prohibiting manufacturers from issuing resale price contracts, to the passage of NRA, there was a growing pressure on Congress and the state legislatures for various types of price maintenance laws. After the World War the advertising of trade-marked products was greater in the drug and toiletry field than in any other group of over-the-counter merchandise. The resultant growth of powerful consumer demand for branded drug products greatly influenced not only the extent of the price-cutting problem and the extension of these products into new distribution channels but also the character of the trade groups demanding legislative relief.

Before the advent of this great consumer demand, manufacturers were dependent to a large degree on the support of wholesalers and retailers for the sale of their product. They confined their sales primarily to drug channels and prior to the Miles' decision and for a few years after, were sincere in their efforts to obtain stablized prices. The horizontal competition between manufacturers' products was not very great and each had a semi-monopoly on his goods. The sale of private brand substitute products by distributors was not large enough to cause worry. It was during this period before the war and the advent of great national advertising that any attempt on the part of a manufacturer to stabilize his resale price was considered a scheme to gouge the public by reaping undeserved profits and courts considered restraints on price-fixing in the interest of public welfare. It was good business from the points of view of both profit and distributor's good-will for the manufacturer to control the resale price and to confine his distribution to the so-called legitimate drug channels.

The Miles' decision was a great blow to this large group of drug manufacturers who had endeavored to maintain their resale price. Many dropped any idea of price maintenance. Some, however, endeavored to obtain stabilized prices by other means remaining after this sweeping decision. A great deal of confusion existed as to just what was legally possible. This confusion was somewhat clarified by the Colgate decision handed down in June 1919 upholding the right of the manufacturer to refuse to sell to price cutters. The Beech Nut case, in June 1922 clarified the situation still more by prohibiting contracts and agreements and cert in other techniques employed in connection with refusal-to-sell. Subsequent decisions have not further restricted the technique available to the manufacturers using refusal-to-sell for price stabilization. Whereas a great many manufacturers were maintaining resale prices prior to the Miles' decision, this number dwindled to the point where at NRA's inception only a few manufacturers were voluntarily making an effort to stabilize their resale prices. During these intervening years, the Federal Trade Commission conducted investigations and held formal hearings on the activities of fifteen drug manufacturers.* In addition to the formal

(*) See list of Federal Trade Commission hearings on page 343 in Appendix to this Report

hearings held, the Federal Trade Commission caused a number of stipulations to be signed by manufacturers in place of issuing a formal complaint. Unquestionable, this pressure from the Federal Trade Commission held down the number of drug manufacturers who advocated price maintenance.

In 1914, the Stevens' Bill and the Metz' bill were introduced into Congress. These bills were designed to nullify the Miles' decision and give manufacturers the permissive right to contract for resale prices. Since that time at least one bill with that intent has been introduced in each Congress up to the 73rd Congress (1933).* The two bills introduced in 1914 had a great deal of support from the manufacturing branches of the drug industry but by the time the Capper-Kelly bill was introduced into Congress in 1931, the number of manufacturers supporting this measure had dwindled. Among the small group of manufacturers who spoke in favor of the Capper-Kelly measure were some who, as judged by subsequent developments, appeared less from sustained conviction than from desire to make a gesture to win support of the trade.

In the latter part of 1925, Sir William Gwin-Jones went to Canada, at the request of certain drug interests, to establish there an organization similar to the Proprietary Articles Trade Association which he had successfully operated for about thirty years in England.** This Association, by means of boycott in England, had been able to stabilize prices in the drug industry. Although the English law allowed contracts for resale price, very few resale price cases ever went to court, as the blacklist method established by the Proprietary Articles Trade Association was more successful. The Proprietary Articles Trade Association was a vertical association, issuing a list of drug products sold by member manufacturers. If a distributor cut the price below the price established by the Association he was denied the right to purchase any of the products so listed. Sir William Gwin-Jones established a similar system in Canada but, after his death, when one or two adverse court decisions were rendered, the Canadian movement collapsed.

Early in 1926, Sir William appeared before drug groups in the United States. Although it was clear that a similar price maintenance system would not be legal in this country, his visit inspired certain members of the National Wholesale Druggists Association to start a drive to persuade manufacturers to adopt a selective distribution policy. There was much enthusiasm over this movement; a committee of four wholesalers called on practically every large drug manufacturer, requesting that the manufacturer adopt a selective distribution (refusal-to-sell) policy. The wholesalers, in turn, promised support to

---

(*) See Appendix Page 380 for an analysis of Federal Price Maintenance Legislation which was considered by Congress between the Miles' Decision, 1911 up to the passage of the National Industrial Recovery Act, June, 1933

(**) See "Retail Price Maintenance in Great Britain" by E. T. Grether, University of California Press

such a manufacturer through wholesalers' salesmen. Many wholesale companies tabulated the sales of the manufacturers who adopted this policy, paid their salesmen extra commissions and gave them other incentives for pushing this merchandise. This development marked the first concerted pressure by distribution groups in this country since the Miles' decision to force manufacturers to adopt a price maintenance policy. According to Drug Trade News some sixty-four manufacturers adopted a refusal-to-sell policy but the number was small in contrast to the many who had price maintenance policies prior to the Miles' decision.* The movement subsided within a year or so because of the fear of the Federal Trade Commission and the indifference of the manufacturers.

The growth of national advertising after the world war, up to its peak in 1929 caused great expansion of the sale of products in the drug and toiletry field. With the flush of expanding volume Manufacturers lost interest in confining the sale of their products to drug channels. As a result, many other types of retailers became competitors of the drug store. Furthermore, the average drug product with large consumer demand became an ideal loss leader as it was of small unit value and its supposed value was well known to consumers; a cut price made an attractive bargain which brought traffic to the stores. Enticed by large profits, many new companies entered the field. This naturally incited competition between manufacturers, and the number of tooth pastes, the number of face powders, and various types of medicines increased. In this atmosphere of expanding business the chain drug stores grew by leaps and bounds. In order to establish themselves in the market they became the aggressive price cutters.

The advent of prohibition also had its effect. Under prohibition the retail and wholesale drug outlets were the only types of distributors who could handle medicinal liquors. A new type of retail druggist appeared whose main interest was the selling of liquor. The wholesale druggist was limited in his selling of liquor to 15% of his total volume of business. In certain instances because of this, distillers with large stocks entered the wholesale drug business and, in order to build up a sufficient volume of drugs to sell their liquor supplies, began cutting prices to the retail trade on drug products. They entered new markets beyond the natural trading area in which they were located. For example, a wholesale drug house in Chicago sold by mail in St. Louis and delivered the goods, offering a 10% cut in price below that offered by the St. Louis companies. During this period the sale of private brand substitute products also greatly expanded. One of the basic reasons for this growth was the price-cutting of standard drug products. The chain operator introduced his own line in order to recoup the losses he encountered on the standard lines. The small retailer also sold private brand merchandise as substitute products to get away from selling standard products in competition with cut-price stores.

In the years just preceding the depression a new type of drug merchant appeared who usually handled a limited number of drug and

---

(*) See Drug Trade News, August 30, and September 13, 1926 issues. See page 355, Appendix for a list of these manufacturers

toiletry products. He rented a store in the shopping center but usually in the middle of the block where rents were cheap. He stayed away from expensive fixtures found in the average store and had some plain shelving built in. From this featured simplicity these stores became known as "pine board" stores and began at once on their chosen careers of undercutting the chains and department stores. During the depression, while the number of other retail drug outlets diminished, the pine board type increased. The pine board, through lower operating expenses and greater flexibility of management, was able to beat the larger chains at their own game. The larger chain stores by this time were well established in their communities and in place of introducing new low prices they adopted the policy of meeting competition.

Early in 1933 a second movement was started by members of the National Wholesale Druggists' Association which encouraged manufacturers to adopt a selective distribution policy. This time some of the large corporate chains joined the wholesale druggists in this pressure. This was important because the average manufacturer could not afford to alienate the chain groups. Previously, some manufacturers thought it wise to make a gesture to wholesalers by appearing to adopt a price maintenance policy but the threat of losing the support of the large chains was serious to all. As a result many more manufacturers than appeared in the 1926 list came out publicly announcing that they would use their legal right to refuse to sell wholesalers and retailers who did not adhere to their suggested minimum prices. This second refusal-to-sell movement was quite effective.

The drug codes which were initially filed with the NRA sought to put a stop to the competitive abuses that had arisen in the industry during the previous two decades. Most of the trouble seemed centered around price-cutting in the wholesale and retail branches of the industry. Therefore, price plans were evolved to stabilize resale prices.

III. THE ORIGINAL DRUG MANUFACTURING CODES

Three manufacturing drug codes were filed. The Package Medicine and the Cosmetic and Toilet Preparations Codes both contained provisions affecting prices but the Pharmaceutical code had none. With the exception of a clause in the proposed Package Medicine code prohibiting sales below manufacturing cost, all of these price provisions were drafted to fix the resale price for distributors.

A. THE ORIGINAL PHARMACEUTICAL CODE

The pharmaceutical manufacturers, whose products were primarily sold on doctor's prescription, were not suffering from the use of their merchandise as loss leaders, and, therefore, felt no urge to ask for a provision in their code to peg resale prices. Pharmacists respect the professional standing of ethical pharmaceutical houses who contribute to the professional, not the commercial, strength of the drug store. The pharmaceutical manufacturers regretted to see the druggists suffer from cut price competition, but the problem was not close to them. Many cut-rate stores had no prescription departments and those having them seldom featured cut prices on prescriptions. Furthermore, the consumer purchasing a prescription had little basis for comparing prices. Even the so-called "Specialties" of the pharmaceutical manufacturers were not readily susceptible to use as loss leaders. These specialties were pre-packaged medicines, but they were intended for sale in an unidentified form on doctor's prescription and not for direct sale to the public under their brand names. As a group the manufacturing pharmaceutical industry had stayed clear of supporting the Drug Institute. This was a vertical trade association formed a few months before NRA. It had a membership classification for every branch of the industry and was designed as a meeting place where the whole drug industry could sit down and work out price stabilization and other problems.

B. THE ORIGINAL COSMETIC AND TOILETRY CODES

In the cosmetic and toiletry branch of the drug manufacturing industry, the Associated Manufacturers of Toilet Articles was the largest trade association. Its membership of large and small companies was scattered over the entire country and represented practically every type of business policy.

As an association, the Associated Manufacturers of Toilet Articles decided a year or so before the advent of NRA that something should be done about competitive practices such as the giving of PMs (sales commissions to retail clerks*), the use of demonstrators, and various kindred types of secret and open price concessions that had appeared during the growth in the industry in the previous decade. To this end the Association voted to ask the Federal Trade Commission to conduct a trade practice conference on the subject. The request crystallized a long fight in the association and

---

(*) PMs are sales commissions paid directly or indirectly by manufacturers or proprietors to retail sales clerks. The origin of the initials is unknown. Some say it means "push money" while others say "post-mortem". The origin of the latter refers to dead stocks at the end of the year which the owner moved off his shelves by giving commissions to his clerks.

caused five of its largest members to resign. The conference was never held but when the NRA was passed, the five dissenting members formed a new association, the Perfumery and Cosmetic Institute, and presented a code to the Administration along with the one prepared by the Associated Manufacturers of Toilet Articles. The members of the Perfumery and Cosmetic Institute were against any strict rules for prohibiting PMs and against curbing the use of demonstrators, probably because the prominence of their products in the trade insured a favored position in the department and chain stores. They had no trouble establishing their demonstrators in the larger stores; other stores whose volume of sales or advertising possibilities did not warrant the use of demonstrators found the PM policy acceptable. In open competition members of the Perfumery and Cosmetic Institute had the advantage over their smaller competitors. The original codes of these two associations reflected this controversy.

1. The Proposed Code of the Associated Manufacturs of Toilet Articles

Article VII of the original code drafted by the Associated Manufacturers of Toilet Articles contained a pledge that every demonstrator was supposed to sign. (*) The demonstrator in this pledge agreed not to "make disparaging or uncomplimentary remarks" about competing merchandise. Furthermore, she would not attempt to substitute the products made by the company paying her salary for other products which a customer might request. The pledge ended with the statement that the employment of a demonstrator who indulged in such practices would be "considered an unfair trade practice." The article went on to say "that it is an unfair trade practice for a manufacturer to continue to employ a demonstrator who has been found guilty of violating this pledge."

Demonstrators were used chiefly in toiletry departments of department stores and their use established a price advantage to the department stores over other types of outlets where demonstrators were not employed. Department store policies varied in their use of demonstrators but, nevertheless, most of them would have resented the use of such a pledge.

The last sentence in the Article stated: "Bribes, gratuities, gifts, PMs and all forms of special commissions paid by manufacturers directly or indirectly to influence retail employees to promote the sale of particular merchandise, shall be considered an unfair trade practice." This prohibited PMs and similar price concessions used by both large and small manufacturers where the retail sales in a store did not warrant the wages of a demonstrator or where the retail store already had all the demonstrators it could use. With the struggle by manufacturers to obtain special sales support in large retail outlets and with the managers of the stores playing both ends against the middle, many competitive abuses had arisen in the industry. Those ranged from a manufacturer's paying PMs to another's demonstrator, to several manufacturers' paying full wages to a retailer for the employment of the same demonstrator. The purchaser never knew when a manufacturer was paying a PM on a sale and seldom was a demonstrator identified as being in the manufacturer's employ. It can be seen from this that a customer

---

(*) See page 343 of Appendix to this Report.

often bought merchandise which he believed was being recommended by the management whereas the sale was actually motivated by the hidden commission to the clerk.

The next Article in the Code made it an unfair trade practice for a manufacturer to discriminate in price among members of the same class of distributors except on a basis of quantity and distance. (*) Certain sales practices were lifted out of the definition of price discrimination in this Article by stating that the wages of demonstrators, the manufacturer's share of cooperative advertising, and the payment for window displays would not be "considered a form of price discrimination". Apparently, although a number of trade abuses had arisen around cooperative advertising and the payment for window displays, this Association did not desire to curb such practices under its Code. Undoubtedly, the small manufacturer would have an equal chance in obtaining cooperative advertising and windowndisplays for his products with his larger competitors. At least this type of dealer cooperation was in the open and subject to check.

Article IX gave the manufacturer the permissive right to make contracts with wholesale and retail distributors about resale prices. (**) It also permitted wholesalers to make contracts with retailers for the resale of products made by cosmetic manufacturers. This clause was based on the principle of the proposed Capper-Kelly Bill which the trade stopped pushing in Congress when the NIRA was passed. The manufacturers of cosmetics and toilet preparations as a group were more interested in this proposed measure than were either of the other two manufacturing branches of the drug industry.

2. The Proposed Code of the Perfumery and Cosmetic Institute

The original code presented by the Perfumery and Cosmetic Institute did not mention any control of the use of PMs or demonstrators. In Article C, Rule 6, appeared a mandatory open price system which also included the permissive right to contract for resale prices found in the Associated Manufacturers of Toilet Articles code. (***) This would have been done by forcing manufacturers to "publish and circulate to the purchasing trade their respective price lists" which contained also the terms of sale and would have acted, if the manufacturer had so desired, as the terms of a resale contract. The manufacturer would have simply issued a contract and made reference to his filed prices. In Rules 7 and 8 stood certain exemptions to the contract price, of the type found in the Capper-Kelly Bill. In the last paragraphs of this Rule the Perfumery and Cosmetic Institute not only asked for "the right to circularize information" about distributors who disobeyed the previous provisions profided for under this plan but went a step further and said that a retailer "shall be obliged" to furnish the name of the wholesaler from whom he obtained the merchandise. (****) This would have resulted in an excellent black-list of both retailers and whole-

(*) See Page 343 of Appendix to this Report
(**) See Page 343 of Appendix to this Report.
(***) See Page 345 of Appendix to this Report.
(****) See Page 345 of Appendix to this Report for Rule 7 and 8

salers who were upsetting the price stabilization scheme. It is interesting to note that while the AMTA and the PCI were at each other's throats regarding the control of certain competitive practices they were in entire agreement in wanting the right to use resale price contracts.

C. THE ORIGINAL PACKAGE MEDICINE CODE

The original Package Medicine Code did not contain a request for the permissive right to contract for resale prices. In its place there was an elaborate mandatory price fixing plan that pegged prices all the way along the line. Competition in private brand merchandise as well as highly advertised standard products had always been much keener in packaged medicines than in toiletry products. The Package Medicine manufacturer did not want his resale prices maintained unless he could be assured that at least the standard advertised products of his competitors were going to be under the same rules. After all, consumers who want to buy Aspirin or Milk of Magnesia may purchase any one of several prominently known brands. Competitive prices play an important part in the selection. Any one of these manufacturers was likely to find himself at a competitive disadvantage if he pegged his resale prices by means of a permissive contract while the prices on his competitor's merchandise were allowed to go down to a low competitive level. Therefore, the package medicine manufacturers if they were going to have resale price maintenance, wanted this to apply equally to their competitors.

In the toiletry field, especially in the higher priced cosmetics, the consumer is influenced more by brand than by price. If a woman has decided that A's face powder, which is a nationally known brand, is the product she wants to use, it is more difficult to persuade her to use another brand than to get her to change her mind about Aspirin or Milk of Magnesia. This contrast becomes more emphatic when private brand substitute products are being offered. A woman may buy B's face powder or some other nationally known face powder in place of A's but often she will not purchase an unknown private brand in place of a standard product, even though the price is very attractive.

The originally proposed code of the package medicine industry was a curious document. It endeavored to set up a partially vertical code by its definition of the members of the trade, attempted to curb the sale of private brands, sought to prevent wholesalers from going into the manufacturing business and reached over into the wholesale and retail fields to peg resale prices.

Although two cosmetic codes had already been filed with NRA, the package medicine draft included this branch of the industry in its definition. (*) The Proprietary Association was the dominant group sponsoring this code. Many of its members made toilet preparations such as tooth pastes, shaving creams, mouth washes and hair tonics. It was for this reason they believed such products should be included in their code.

(*) See Page 346(Article II) of Appendix to this Report.

The elaborate price plan set forth in Article V (*) was based on the standard pricing structure found in the drug industry. (**) This price scheme insured a gross margin of 33-1/3% of the retail selling price to the retailer and gave the wholesaler at least a 6% gross margin on his selling price to the retailer. It tied down the wholesaler to a limit of 2% cash discount with certain exceptions on special occasions where he could give more but with the restriction that this could not exceed one-third of the margin he received. Retailers were prohibited from selling below the full consumer published price less 21% (***) with the exception of the ten cent size which could not be cut at all. This full price maintenance proposal for the benefit of the five and ten cent stores had previously been a point at issue between manufacturers and certain retail groups. Many manufacturers refused to sell this size to drug stores lest they cut the price to prevent this business from going to the fixed price variety store. In order to get the five and ten cent stores to handle their products, manufacturers had to assure them that the price would not be cut. The fixing of the ten cent price in the manufacturing code would have added fuel to the fire.

There were a number of other clauses in this article that attempted to plug the loopholes in the scheme. The only provision affecting the price to be received by a manufacturer for his goods was one stating that he could not sell "below his own cost of production or manufacture". This clause might have affected some manufacturers of private brands who competed with other manufacturers' low prices on products such as aspirin and mouth washes, but hardly would have touched the makers of nationally advertised products, whose margins of gross profit were usually large. One provision in the Article touched the private-brand-substitute-product situation by stating that distributors "are working contrary to the interests of the trade as a whole if they attempt to substitute or divert sales" on such products made by manufacturers who adhere to the price plan mentioned above.

This attempt to curb the competition of private brand substitute products was more fully covered in Article VI. (****) Paragraph (d) of this Article established a far reaching proposal preventing wholesalers from making competitive products. It said that it was "an undesirable and uneconomical practice for the wholesaler to carry on the manufacture or distribution of products in competition with nationally advertised products." The record failed to disclose the feeling of the wholesale druggists on this matter. However, it was apparent that the package medicine people were feeling the competition of the wholesalers' own branded products.

(*) See Page 346 of Appendix to this Report.

(**) See Part II, Chapter I, Section II of this Report for an explanation of the pricing structure of the drug industry, Page 351

(***) This 21% clause appeared in some of the revised preliminary drafts of the Retail Drug Code; see Page 366

(****) See Page 346 of Appendix to this Report

In paragraphs (c), (f) and (g) of Article VI are found restrictions on imitating another manufacturer's products, a prohibition against repackaging a product, and an attempt to control counterfeiting by forcing purchasers to buy "from the manufacturer or his recognized distributors."(*) The large spread of profits in the drug business had invited a number of undercover companies to make imitations of standard products and even in some instances to make complete counterfeits. The chaotic price condition in the retail trade made it comparatively easy for such products to reach the market.

In paragraphs (h) and (i) of Article VI (**) the sale of private brand products was completely outlawed when these products were offered as substitute products for advertised brands. The code sponsors felt that "where a manufacturer, through enterprise, advertising or reputation, has built a trade for an article, he is entitled to profit therefrom and any interference with the normal demand of trade or of consumers is unfair." They then described the "switching" of goods "other than those requested" as being an interference which was a "reprehensible and unfair practice". Not only was switching barred but the distributors were not allowed to make "disparaging statements regarding the products or prices of a manufacturer". The provision ended with this challenging statement, "when a product is asked for by name, it shall be sold". From these code prohibitions on the sale of private brand substitute products it was evident that the sponsoring committee of the proprietary medicine industry wanted to put such competition in a straight-jacket. They had much to gain in such an effort. Sale of private brands had greatly increased during the depression and the manufacturers keenly felt this growth. Large advertising outlays had lost some of their effectiveness and there was grave doubt as to whether the return of good times would dispel the consumers' willingness to accept substitute products. From the restrictions they put in their code, it seemed evident that the sponsoring group wanted to correct overnight a situation they themselves had helped create by their rush for volume to keep pace with their advertising expenditures.

In paragraph (j) of Article VI appeared a provision intended to standardize the use of various price concessions. (***) This restriction was similar to those set forth in the open price provision of the Perfumery and Cosmetic Institute Code but did not go as far. It would have bound the members to a uniform system of price concessions, tending to clarify some of the various ramifications of the vertical price scheme set forth elsewhere in the code.

In Article VII a committee was set up to administer the code, with the Drug Institute as a compliance clearing house. It is curious to note that the package medicine was the only manufacturing code, so far considered, which mentioned using the Drug Institute as an enforcement agency.

(*) See Page 346 of Appendix to this Report.
(**) See Page 346 of Appendix to this Report.
(***) See Page 346 of Appendix to this Report.

D. THE PROPOSED DRUG INSTITUTE CODE

The Drug Institute sponsored a vertical code for the whole industry.(*) It purported to contain all of the best provisions from the codes that had been filed for the different branches of this industry. Article V, "PRICES", of this document was practically identical with Rule 6, the price filing provision, in the code submitted by the Perfumery and Cosmetic Institute, the only difference being that the former was reworded to fit this vertical instrument and contained two additional sections setting up the method for filing prices. There was no elaborate price stabilization scheme in the Drug Institute code such as that set forth in the package medicine code.

In Article VI, Unfair Practices, Sections 7 and 8, a mild attempt was made to regulate the sale of private brand substitute products. It is difficult to determine the full significance of these two Sections because their language was vague. They read as follows:

"It shall be an unfair trade practice

"Section 7. To prevent, by uninvited persuasion, disparaging innuendo, or by concealment, a customer or prospective customer from purchasing a particular product which he has requested --

"The uninvited dissuading or the attempt to dissuade a customer or prospective customer from purchasing an article of a particular brand, trademark or type, which such customer has requested, and persuading or attempting to persuade such customer to purchase an article calculated and designed to serve the same purpose, but of a different brand, trademark, or type than the article requested, unless the vendor has not available for sale the article so requested, and unless such fact is so disclosed to such customer or prospective customer.

"Section 8. To prevent the substitution of a product for one which the customer believes he is purchasing --

"The sale and/or delivery to a person of an article of a different type, brand, or trademark from that which the customer or prospective customer believes he is purchasing, unless such fact be disclosed at the time of sale or offer for sale by the vendor to the customer or prospective customer."

It is evident that the above two sections were a milder substitute for the drastic clauses requested in the original package medicine code. The record did not disclose whether or not these sections met with the approval of the package medicine code committee.

Before discussing the manufacturing drug codes as NRA approved them we shall examine the wholesale drug codes as they were originally presented.

(*) See "The code for the Drug Industry" in the August 7, 1933 issue of Drug Trade News.

IV. THE PROPOSED WHOLESALE DRUG CODE

A. NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION PROPOSALS

The National Wholesale Druggists Association had a membership of over two hundred companies, most of which had been established for a number of years. They are known as service wholesalers because they stock a complete line of drug products, extend credit, and as a rule maintain traveling salesmen. The Federal Wholesale Druggists' Association had only about twenty-five members, most of them established within the past twenty-five to forty years. These companies were cooperatives or mutuals. As a rule, they carried a smaller stock, extended less credit, if any at all, and maintained fewer traveling salesmen than did the service wholesalers. They gave patronage dividends to their members or stockholders and thus afforded the druggist who could finance the plan a decided price advantage over his competitor who had to rely on the service wholesalers' credit facilities. The service and cooperative wholesalers had been fighting each other for years.

1. An Informal Code

An informal wholesale code was presented to the NRA. (*) The record does not disclose whether this proposed code had the endorsement of a sponsoring committee, or was merely prepared by an individual. Regardless of the authorship, it illustrates the type of business maneuvers which were current in the early days of NRA and should be examined briefly before looking at the authorized drafts which were filed. The title of this document is "Tentative Memorandum as a Basis of Discussion in re: 'Code for Wholesale Drug Industry' - under the National Industrial Recovery Act." It is followed by a preamble describing the National Wholesale Druggists Association as being "fully qualified and equipped to fulfill all the needs and requirements of the medical profession and approximately 60,000 retail druggists in the interest of public health". (**)

Turning to Section 6, we find a threat of boycott of manufacturers who did not adhere to certain policies. (***) It first stated that no wholesaler "shall purchase or distribute a product of any manufacturer whose policy shall not conform" to certain principles. In the enumerated principles are listed some to which certain manufacturers would have been likely to object. It is difficult to believe, for

---

(*) This document was probably a trial balloon submitted informally to see how the NRA reacted to its terms. It was sent to Deputy Administrator Whiteside on July 27, 1933. See Appendix, Page 348 for this correspondence and certain provisions pertinent to this discussion. The complete document can be found in the Deputy's files.

(**) See Page \ of Appendix to this Report.

(***) See Page \ of appendix to this Report.

instance, that manufacturers would relish "the prepaying freight to all points within the United States" nor would they care to have the wholesalers dictate a "15% trade discount" and a "2% cash or prompt payment discount" as being the minimum they could give on their goods.

The manufacturer might not object to putting the "retail price to the public" on his package but would be apt to resist issuing "two separate and distinct price lists" to the wholesale and retail trades respectively, especially when such price lists "must be open and fair to all" in the specific selling terms which they were to set forth. These selling terms included all types of price concessions found in the trade. In exchange for the manufacturer bringing all his operations out in the open and equalizing his terms to members of the same class, the manufacturer would receive notice of every retailer or wholesaler who violated his policies. This list was to be his blacklist. The wholesalers would aid him in cutting off the offending retailers.

The next section established a rigid limitation on the cut prices a wholesaler could give to a retailer. (*) This was done by limiting discounts proportionately to the total amount of each item purchased by the retailer at one time. If a retailer bought $2.00 worth of a product in one purchase the wholesaler could give 1% discount. If the amount was between $2.00 and $7.99 he could give a discount "not to exceed 25% of the discount allowed to the wholesale druggist by the manufacturer." If the retailer bought $8.00 worth or over of a product, the wholesaler could give a discount "not to exceed 33%" of that allowed by the manufacturer, "but in no instance" was the amount left for the wholesaler "to show less than 8% gross profit" to the wholesaler. This scheme was not as complicated as it sounds and could easily have fitted into the "service" wholesaler's method of billing orders because of the basic pricing structure of the industry. (**) The plan was partially predicated on the idea that it cost a wholesaler practically the same amount to fill an order for an expensive product as it did for a cheap one. On the higher priced article he could have given away more since the percentage of handling cost per dollar sale would have been less. Furthermore, the plan would have encouraged a retailer to purchase products in larger quantities to earn a better discount. Even before the depression, the small druggists were buying from hand-to-mouth, in many cases as low as 1/12 of a dozen of a fast selling product. This was especially true in large cities where daily orders and same-day deliveries were one of the "service" wholesaler's best weapons to hold its trade. Another part of this plan provided that discounts would be allowed on monthly purchases. Those amounted to 1% on purchases from $300 to $500, 2% on $501 to $1,000, and 3% over $1,000. This again would have been an incentive for the retailer to confine his purchases to a smaller number of suppliers.

Very few cooperative wholesalers could supply the complete drug

---

(*) See page 350 of Appendix to this Report.

(**) See Part II, Chapter I of this Study. Page 351.

needs of a drug store. Refusal-to-sell policies of manufacturers were partially responsible for this but the main reason was that the cooperatives, by their nature, wanted to hold their inventories to products which had a decent turnover. The many thousands of items for which the retailer had only an occasional call, had to be bought from the "service" wholesaler who, as a rule, prided himself on being able to offer a complete service. Any discount plan based on monthly purchases would have deflected business to the "service" type of wholesaler, since every druggist had to deal with one of them and the total purchases of most druggists were so small that an even split of business might have kept them out of the best discount bracket. But regardless of the potential advantages of such a price plan to the "service" wholesaler, it appears that the cooperative wholesalers' method of operation could not have been adjusted to work under such a rigid scheme and the cooperative would have lost its trade eventually to the "service" wholesaler. Although not all of the wholesale mutuals and cooperatives operated in the same way, they did have the same purpose of sharing profits with their members. Most of these profit sharing dividends were given to the retailers at the end of a week or a month. Receiving a check from one's wholesaler was a tangible indication of the saving the retailer had made on his purchases. Even if the retailer received as low net prices from the service wholesaler, at the end of the month when he paid his bill the cooperative's plan of giving him these savings in the form of a check by weekly or monthly payments led him to believe he was saving more under their system. Added to this, the cooperative member had a proprietary interest in his own company. Cooperative profit sharing was based on the gross profit on each item. It had no relationship to the amount of a particular item purchased on one order, which was the approach set forth in this provision. For example, a member might have purchased one dollar's worth of a product on which the cooperative wholesaler received a 25% discount from the manufacturer. If the cooperative wholesaler's overhead was 10%, this retailer would have received a 15% (25% less 10%) cut on this purchase, and the product would have cost him 85¢, ($1.00 less 15¢). This purchase, under the code provision, would have given the retail member a discount of only 1%. The balance of the discount due him would then have been given as a dividend on stock owned at the end of the year or by some other method of distribution. Any such procedure, however, would have destroyed the psychological effect on the retail member of receiving a share in the profits as he went along, from week to week. In such a situation, unquestionably, the service wholesalers would have tended to regain their lost ground.

This proposed rigid price plan ended with the limitation that all discounts set forth in the provision were to be considered cash discounts and that the Board of Governors of this association would file, as a public record, a list of "not less than 10,000" medicinal, toiletry and sundry proprietary items "for the benefit of retail druggists and retail dealers" with the stipulation that no product would be included in this standard discount list if the manufacturer's "sales' policy was adverse to the granting of such discounts". This not only gave power to the association to list the products of manufacturers whose policies would pass muster but was to serve as a weapon to force recalciltrant manufacturers into line, since obviously the service

wholesaler was interested in selling only such products as appeared on the list.

Under Section 9 a wholesale druggist could not give any free goods or other price concessions not specifically authorized by the manufacturer. (*) The provision went on to say that where a manufacturer instructed the wholesaler to give one free with a dozen or some other type of price concession, the wholesaler was compelled to pass on such benefits to his retail customer. If the wholesaler did not do this such violation would be "deemed unfair competition and punishable by a fine of not less than ($_____) for each specific offense if upon majority vote of the Board of Governors of this Association, the offender should be found guilty of such practice". This notion that the Board of Governors should pass judgment on the violators of this provision and impose a fine when the majority of its members decided the offender was guilty was an extreme example of "industry governing itself".

The next section set up a potential boycott against manufacturers who gave inside discounts to large retailers. (**). It stated that the wholesale druggist "shall not be obligated nor required to purchase any product from any manufacturer on which the manufacturer establishes a price differential "of less than 15%" between wholesale and retail druggists. The next paragraph of this provision stated that it was unfair for a manufacturer to give "retail chain store systems, department stores, mail order houses, syndicate stores, and any and all other organized systems of distribution..... any prices, terms, conditions, special inducements, or advantages and special allowances for window or store display or advertising" without giving these same "advantages to any and all other independent retail druggists" who would like to take advantage of such offers under the same terms. This idea was amplified in section 15*** by stating that wholesale druggists were " committed to a policy of purchasing, featuring, and supporting the products of only those manufacturers whose sales policy.....would insure.....the independent retail druggist.....against loss caused by predatory price-cutting practices" of stores featuring "standard and nationally advertised" drug products "at cut prices on a basis of cost or net cost." The provision also set forth that the average cost of distribution by the retailer was 27% "after diligent investigation and research over a period of years". This clause was a direct bid for the good-will of the independent retail druggists. It bound the wholesalers to a policy of supporting only manufacturers who insured the independents a profit. It did not set forth just how manufacturers could protect these independent druggists to the extent of insuring them an average gross profit of 27%.

It should be emphasized again that the code we have just discussed was not officially filed with NRA. It illustrates, the conceptions of trade

(*) See Page 351 of Appendix to this Report.

(**) See Page 352 of Appendix to this Report.

(***) See Page 353 of Appendix to this Report

possibilities under NRA that were held by certain trade groups in the early days of code formulation. We shall now take up the wholesale codes that were officially presented to the Administration.

3. The original National Wholesale Druggists' Association Code Filed with NRA

The National Wholesale Druggists' Association and the Drug Institute presented to the Administration codes for the wholesale drug trade which, as far as this discussion is concerned, were identical. Article V, Section 1 of this code* established the "cost-sold" formula for the fixing prices at wholesale. A wholesaler could not sell a product below the "cost-Sold" figure which had been previously calculated and circulated in the trade by the Drug Institute after "consultation with the Statistical Division of the National Wholesale Druggists Association and the Federal Wholesale Druggists Association on the basis of their own research and the economic, statistical and accounting reports submitted to them from time to time by members of the code." Certain rules were specified for determining the "cost-sold" price which included all overhead charges used to determine costs "in accordance with good accounting practice". No mention was made of an average cost to be used or how such an average was to be weighted to be fair to cooperatives and the short line wholesalers whose operating costs were lower than the "service" wholesalers. The nearest approach to a concept of an average cost was the specification that "in calculating the 'cost-sold' of any merchandise, the cost to the entire wholesale drug industry shall be approximately determined".

This draft further provided that all discounts were to be cash discounts and allowed only if paid within the customary discount period provided, of course, that such discounts did not bring the price of a product below the "cost-sold" figure. The administrative difficulties of such a price plan would have been great, for the amount of research necessary to determine the "cost-sold" on many thousands of products would have been too vast for a competent job to be done. This plan was better for the "service" wholesalers than the previous sliding discount scheme, because it not only would have crippled their cooperative competitors but would have given them more profit in the process. The cooperative wholesaler would have encountered practically the same disadvantages in this plan as he would have in the other suggested clause.

The "cost-sold" clause had its counterpart in the proposed retail drug code,** The retailers' plan, however, while simpler in operation gave the retailer a relatively better break as it took the St. Louis Drug Survey's figure of approximately 28% as the "cost-sold" percentage and used the manufacturer's wholesale list price per dozen as the cost and then added 5% for good measure. The retailers' system not only took care of the average operating expense as did the wholesalers' but

---

(*) See Page 353 of Appendix to this Report

(**) See Part II, Chapter III of this Report. Page 366

gave them 5% profit. In Section 2, Article V, we find the requests for the permissive right to contract for resale prices.* This provision would have tied in with a similar provision found in the proposed Perfume, Cosmetic & Other Toilet Preparations Code and the Drug Institute Code. The proposed Retail Drug Code also asked for this clause**. In Article VI, Sections 7 and 8 appeared the identical clause on substitution and switching found in the vertical Drug Institute Code on which we have commented. In Article VII of this draft the Drug Institute was established along with the National Wholesale Druggists' Association and the Federal Wholesale Druggists' Association as a compliance agency.

B. THE FEDERAL WHOLESALE DRUGGISTS' ASSOCIATION CODE

The first wholesale drug code submitted to the Administration was that drafted by the Federal Wholesale Druggists' Association. The following paragraphs from the statment filed with this code are of interest

> "The cooperative wholesale drug companies, operating their cooperative wholesale warehouses, serving their stockholder and member customers, submit this brief historical statement of the economic reasons for creation of this cooperative wholesale plan of serving the individual retail merchants in the drug industry.
>
> "Thirty-five or forty years ago saw the beginning of the 'cut-rate' retail drug store. The 'cut-rate' druggist realized the advantage over his competitors if he could purchase at least his big selling items direct from the manufacturers thus eliminating the profit made by the wholesaler. This he eventually did and as the fight grew warmer, prices were cut lower, and it soon developed that the wholesale margin was the entire profit made by the 'cut-rate' druggist. Most of his competitiors with a small volume of business and less working capitol could not buy in quantities sufficiently large to justify the manufacturers selling to them. Something had to be done. There was no hope of remedying conditions except from their own ingenuity. It was determined to do collectively what they could not do alone -- to buy the big selling items in large quantities direct from the manufacturer, thus securing the lowest price, and divide the purchases into such proportions as each required, thereby placing themselves in a position to sell goods at the same prices as their 'cut-rate' competitors sold them. This netted them a small profit where an actual loss had previously been sustained. Subsequently, chain stores came into the picture. They were operating their own warehouses and buying direct from manufacturers at whole-salers'

(*) See page 353 of Appendix to this Report

(**) See Part II, Chapter III of this Report Page 353

discount and terms, obtaining merchandise at from 10% to 25% less than the retailers' cost. This compelled retailers to form mutual and cooperative wholesale companies and duplicate the chain store warehouse plan. Thus the foundation was laid for the development of the large cooperative wholesale drug companies. Many of them now do an annual business of more than one million dollars and some have passed the six million mark.

".....

"All customers of the cooperative wholesale drug companies are financially interested in the company from which they secure their supplies, either by investment in the stock of such companies or by a cash deposit in the working capital of such companies.

"The Federal Wholesale Druggists' Association is in full accord with any and all plans that will effect an improvement of the profits of the independent retail druggists of the nation and will heartily support such plans. This association came into being to save the independent retail druggist fromdestruction. It will continue to serve this purpose particularly at the present time when the independent druggist needs help as never before."

This statement also contained the names of the twenty-five members scattered throughout the United States and Canada and gave the following figures which illustrated the scope of the cooperative movement in the drug business:

These represent a combined capital of	$5,706,643.00
Doing an annual business of	45,323,157.00
Having a surplus of approximately	1,540,120.00
Carrying an inventory approximating	5,585,025.00
Employing approximately, men and women	1,500
Their Stockholders and members, independent retail druggists, numbering approximately	11,561
These stockholders and members employ in their retail drug business, men and women	46,244
And do an annual business in their retail drug stores of approximately	358,391,000.00

The code* drafted on June 28,1933 contained a set of rules applying to all three branches of the drug industry. In the "Rules on Behalf of Manufacturers" were two of interest to the discussion. The first stated that the distribution of drug products should be confined to the essential channels of drug distribution and the second rule prohibited a manufacturer from selling merchandise "below cost of production and distribution, plus the interest on capital invested and a reasonable profit". As has

---

(*) See Page 354 of Appendix to this Report.

been stated before, this type of price provision would have had very little effect on the drug manufacturing business. In the next group of "Rules on Behalf of Cooperative and Mutual Wholesale Druggists" we find this interesting proposal:

> "Rule 1. Proprietors of new retail drug stores should be required to have sufficient capital to put in their stock of merchandise because there are now too many retail units in the industry and wholesalers should not finance new stores except where the potential patronage warrants it."

Obviously, this rule was aimed at wholesale drug companies who encouraged retailers to start with little capital by using what credit facilities the wholesaler could give them. This practice was quite an effective weapon of the service wholesalers to check the growth of cooperative membership. Cooperatives extended practically no credit and, therefore, had little opportunity for obtaining opening orders from new drug stores.

Rule 4 prohibited selling below the full cost of doing business, but this provision was based on each individual's cost and, therefore, entirely different from the "cost-sold" formula found in the National Wholesale Druggists' Association code. This method of an elastic code minimum in place of a fixed code minimum would have given the cooperatives a great advantage over the service wholesaler as their cost of doing business was decidedly less. In the "Rules on behalf of Retail Druggists" a provision appeared similar to the "cost-sold" plan of the original Retail Drug Code.*

However, this request was more modest as it asked only that the minimum price "be based on manufacturer's list price plus average cost of doing business in a retail drug store (22% of gross sales which is 4% less than the St. Louis survey)." It is to be remembered that the Retail Drug provision asked that 28% be added to the manufacturer's list price and then an additional 5% to cover the retailer's profit. Thus, the retailer's request was approximately 2% greater than that suggested here.** The next provision in the Retailers' Rules set forth that the sale of medicinal preparations or drug products should be confined to "legitimate drug outlets". The definition of a "legitimate outlet" was then given as being a "retail establishment under the supervision of a registered pharmacist". This provision tied in with the one mentioned above which stated that manufacturers should confine their sales to "the essential channels of drug distribution". The retail membership of wholesaler cooperatives was made up entirely of drug stores that employed pharmacists. The growth of other types of retail outlets handling drug products was quite a threat to the independent pharmacists and, naturally, when a group of these pharmacists

---

(*) See Part II, Chapter III of this Report Page 366.

(**) In Codes that we have so far examined there seems to be quite a discrepancy in the average retailer's cost of doing business. In the NWDA draft it was given as 17%. In the NWDA draft we find 22% and in the retailer's clause, approximately 25% is suggested.

get together and formed a coop rative they would admit to membership no store without a prescription department. For many years the service wholesaler had a policy of confining sales to the so-called legitimate drug stores. However, when manufacturers, under the influence of large advertising expenditures and the rapid growth of consumer demand, looked around to find a wider market they encouraged the service wholesaler to sell to these newer types of outlets who were partially entering the retail drug business. The retail drug state associations had endeavored to protect themselves from this growth of pseudo drug stores by bringing pressure on legislature to pass laws confining the sale of drug products to stores employing a registered pharmacist. An extreme example of the retail grocers reaching over into the drug field was found in the development that occurred among retailer members of a voluntary chain located in and around Houston, Texas, in the fall and winter of 1932. In a comparatively few months, 400 out of a possible 450 outlets had put in a supply of private brand household drug products. In 150 of these, a $300 assortment was placed in stock. These stocks included such products as aspirin, mouth wash, milk of magnesia, bathing alcohol, and a few toiletry products. Previous to this development the large food markets in Houston had, for a year or so, practically complete drug departments. This sale of drugs by grocers increased to the extent where one drug manufacturer estimated that 75% of his sales in Houston were made through grocery stores.

C. OTHER WHOLESALE DRUG CODES

The Independent Wholesale Druggists of America was a newly formed trade association with members located principally around New York City.* Most of them carried limited stocks and as a rule cut prices drastically. Article VI of their proposed code restricted wholesalers from selling below "net invoice cost after all discounts, (including cash discount) had been deducted or open market price, whichever is lower" plus 5%. It further stipulated that all discounts allowed by wholesale druggists should be cash discounts and allowed only if the retail paid within the customary discount period. Members of this association claimed that their overhead was lower than the service or cooperative wholesalers. This price restriction was lower than that in the other two wholesale codes we have examined. In fact, this provision would have placed a bottom on prices below the competitive cut-price level and, therefore, would have been no aid in curbing wholesale cut prices.

The Allied Wholesale Druggists' Association was also a new trade association formed for code purposes. Its membership was of small cut-price wholesalers located chiefly in New York City. Sales to many of these wholesalers had been cut off by manufacturers who adopted the refusal-to-sell policy early in 1933. This association presented a code to the NRA and the following paragraphs, quoted from the preamble of this document indicate that the members of this association desired the NRA to do something about this refusal-to-sell movement:

(*) See Page 354 of Appendix to this Report.

"Nationally advertised products are obviously an essential part of the inventory of a wholesale druggist. Deprived of them or any of them, a wholesaler is under a most severe handicap and is forced to offer inducements to his customers in an effort to retain their patronage.

"Certain manufacturers of nationally advertised products have restricted the distribution of their products to certain specially selected wholesalers and have arbitrarily refused to sell to others, forcing many wholesalers out of business and causing others to set up retaliatory tactics in order to survive. These tactics have assumed many forms but were in substance, price-cutting. A vicious economic system was thus created which has undermined the entire industry affecting manufacturers, wholesalers, and retailers, increasing hours of employment and decreasing wages.

"In order to maintain minimum wages and maximum hours of labor, wholesalers must be in a position to fairly compete with one another; distribution of nationally advertised products must be unrestricted and available to all wholesalers who are willing to abide by the sales policy of our manufacturers.

"It is our belief that this form of discrimination has been engendered by powerful minority interests with monopolistic ambitions. We do feel, however, that a statement in the drug code to the effect that arbitrary discrimination by manufacturers of nationally advertised products in the selection of their distributors shall be deemed to be an unfair trade practice, will go far to the elimination of this abuse."

In the body of the Code* they declared that "it is an unfair trade practice for a manufacturer to use any arbitrary discrimination in the selection of its distributors." In the next Section they endeavored to prohibit a manufacturer from enforcing any refusal-to-sell policy and to force him to sell to every body. This code contained another clause which prohibited the sale of merchandise by a wholesaler "below the cost of purchase and distribution plus the interest on capital invested and a reasonable profit". Such a restriction, if enforced, would have been an advantage to this group as the overhead of its members was probably as low as could be found in the country.

(*) See Page 354 of Appendix to this Report.

V. SUMMARY

This brief examination of the original drug codes filed with NRA illustrates clearly that the predominant elements in the manufacturing, wholesaling, and retailing branches of this industry wanted the Government to approve codes which would stabilize resale prices and curb other competitive practices attendant on the price cutting condition found in the trade in 1933.

In the manufacturing division, the pharmaceutical group was silent on this problem in its proposed code. However, they represented a comparatively small part of the manufacturing drug business.

The period from 1911 to 1933 (following the Miles' decision) saw continuous pressure in various elements of the industry on Congress to nullify the effects of this decision. Along with this effort were various attempts to use refusal-to-sell policies as practically the only legal method a manufacturer could adopt as long as the Miles' decision was in effect.

The principle of the Capper-Kelly bill then before Congress of giving the permissive right to contract for resale prices was found in the two proposed codes of the Perfume, Cosmetic and Other Toilet Preparations' group, in the Drug Institute's vertical code, in the Wholesale Drug Code filed by the service wholesalers, and in the Retail Drug proposal. While the retail members of cooperative wholesalers were in favor of resale contracts, the Federal Wholesale Druggists' Association apparently anticipated difficulties in resale contracts with their method of doing business as their draft did not contain this proposal. Obviously, the Independent and the Allied Wholesale Druggists' Association, since they were cut-price wholesalers and sold chiefly to cut-price retailers, opposed the Capper-Kelly idea. Most of the proposed drug codes contained provisions affecting other branches of the industry.

The Drug Institute endeavored to draft a vertical code arrangement but it cannot be said that this was responsible for the many provisions that attempted to govern other branches of the industry. By its nature, resale price maintenance, to be effective, must be integrated throughout an industry. Whole the members of the Package Medicine Industry asked for resale price maintenance they wanted it only if it could be mandatory not only for all manufacturers but for distributors as well. They had no interest in obtaining merely the permissive right to contract. From the other clauses in their code designed to eliminate all competition from private brand substitute products it seems evident that they suffered a great deal from this type of competition.

CHAPTER II - DURING NRA

I. ATTEMPTS AT DRUG CODE CONSOLIDATION

Price stabilization provisions which finally emerged approved in the various codes usually differed completely from the proposals originally presented to the Administration. This was especially true of the proposals just examined. Elimination of these original proposals or their evolution into the resultant approved clauses with their subsequent amendments illustrates the shifting of business forces under the NRA experiment. Before taking up each proposal discussed in the previous chapter to determine what happened to it, we shall describe efforts made by NRA and trade committees to consolidate the codes or to integrate them in some fashion for the industry as a whole.

As has been said, the Drug Institute was formed early in 1933 as a drug industry clearing house where price stabilization and other industry problems could be discussed and possibly corrected. Its membership was made up of individual persons from all branches of the industry. Companies or corporations as such, were not permitted to join. The Appalachian Coals Decision encouraged such vertical trade associations, and it was believed that possibly some constructive work could be done with refusal-to-sell policies by open discussion and individual example in such an all-industry forum as the Drug Institute was intended to be. Details of price stabilization plans were being formulated by the Institute when the NIRA was passed. The Institute immediately jumped into the typical activity of the period and endeavored to draft a vertical code for the whole industry with appropriate subordinate codes for each branch. From the start, NRA refused to consider any vertical arrangement of codes for the Drug Industry. This position was taken not so much on the assumption that the industry might use it as a vehicle for setting up some sort of a "drug trust" as because the NRA early adopted the policy of establishing horizontal functional codes for the distributive trades.

Some officials of NRA suggested that a drug industry coordinating council be established as an advisory planning body to assist the Administration and the separate code authorities in administering the codes and to act as a general clearing house for the overlapping code problems of the industry. This Council was to be composed of representatives of every code authority, but in no way were the functions of these bodies to be subordinated to the council except where certain routine matters were given it by vote of each individual code authority. A meeting was held on December 14, 1933 by NRA (*) with representatives of the various drug code committees and the retail drug code authority.(**) Many code problems in the industry were discussed at this meeting and the various code committees were informed that their pro-

---

(*) See transcript of this meeting in Code Record Section, NRA

(**) Only the Retail Drug Code was approved by this date. The other drug codes had not ever been presented at public hearing.

posed price control plans would not be approved. At the time of this meeting NRA had already disapproved the price provisions suggested by the retail druggists, but the manufacturers and wholesalers were still hopeful of NRA's acceptance of their price control plans. Very little was accomplished with the suggestion for the coordinating council. However, the plan did not completely die at this time and all the branches of the industry with the exception of the Pharmaceutical group subsequently requested a provision in their codes to provide for the appointment of representatives to serve on such a council when it was established. (*)

Because the three drug manufacturing groups overlapped, to a considerable degree, NRA endeavored from the start to consolidate their codes. It soon appeared that trade practice abuses differed among them and that it would be difficult to harmonize their trade practice provisions. Therefore, the suggestion for one master manufacturing code was set aside in favor of a basic wage and hour code with separate trade practice schedules and sub-code authorities. The code committees for the Package Medicine and Perfume and Toilet Preparations groups indicated that they would approve some sort of joint code, but the Pharmaceutical code committee refused even to attend a proposed meeting of the three code committees to discuss the suggestion. With this branch refusing to enter into such an arrangement it was deemed unwise to try to merge the other two.

(*) See page 356of Appendix - for copy of proposed Executive Order establishing Drug Industry Coordinating Council

II. THE PHARMACEUTICAL AND BIOLOGICAL CODE

The Pharmaceutical code was finally set for public hearing on May 1, 1934, without any trade practice provisions. The long delay was due to basic differences of opinion between NRA and the code committee about certain labor and administrative provisions. This argument continued into the post-hearing period so that the code was not approved until October 25, 1934. At various points during the negotiations for this code, the Code Committee gave some thought to trade practice provisions but the NRA did not insist that they be included in the code and the approved draft contained none. In this draft, however, appeared a provision (*) instructing the code authority to make a study and report to the NRA within four months after the code authority was approved on the needs of the industry for the establishment of fair trade practice rules in the code. No official recommendation was ever made by the code authority to NRA on this problem.

III. THE PERFUME, COSMETIC AND OTHER TOILET PREPARATIONS CODE

The public hearing on January 17, 1934 for the Perfume and Cosmetic Industry was held on a code presented by the Associated Manufacturers of Toilet Articles. (**) Many drafts of this code were made from the time it was originally filed until it was in shape to go to public hearing. Some of the provisions that appeared in the original Perfume and Cosmetic Industry proposal were incorporated. The open price provision appearing in the public hearing draft was modeled after a similar provision that appeared in the original Perfume & Cosmetic Industry code. However, the new provision had been enlarged to include the posting of all direct and indirect price concessions. The principle of using the open price plan as the basis for permissive contracts for resale price remained. The NRA's refusal to approve the right to contract for resale prices in the retail drug code should have clearly indicated that the same policy would hold in this code. (***) The Code Committee wanted to convince NRA that it was wrong and insisted that the clause stay in the code at least through the public hearing stage. (****)

(*) See Article VI, Section 2 (h) of this approved code, #529

(**) See page 360 Appendix of this Report for Price provisions in this Code.

(***) See Part II to this Report, pages 366 et seq.

(****) In order not to delay hearings, NRA officials sometimes allowed certain clauses to remain in the hearing draft of a code even though definite NRA policy would prevent their final approval. This action often helped the Code Committee to convince its constituents that it had put up a good fight for their demands and thereby obtained for NRA the necessary consent of the Committee to the calling of a public hearing. Furthermore, the inclusion of these clauses in the hearing draft usually brought out in open discussion the controversial issues within the industry.

In the code approved on March 23, 1934, the permissive right to contract for resale prices did not appear in the open price system. (*) In other respects this open price clause remained practically throughout the life of the Code as it had been drafted for hearing.

The various price discrimination clauses and restrictions on cooperative advertising are so interwoven into the open price system that an examination should be made of the approved provisions to judge the full significance of the attempt made in this code to eliminate competitive abuses. (**)

The fight over the elimination of PMs between the American Manufacturers of Toilet Articles and the Perfume and Cosmetic Industry continued up to the approval of the Code. The hearing draft contained a direct prohibition of PMs but in the approved code this provision was stayed for a period of six months in which time the Code Authority was to report on the need for the prohibition. (***) This stay was never removed as the condition for its removal was never approved by NRA.

In the hearing draft, the American Manufacturers of Toilet Articles had their way in requesting that a demonstrator be clearly identified to the public as being in the employ of a manufacturer.(****) Some of the manufacturers who did not employ demonstrators wanted them prohibited but the majority of the larger manufacturers, both members of the American Manufacturers of Toilet Articles and the Perfume and Cosmetic Institute, were decidedly against their elimination. In the approved code the provision appeared (*****) unchanged except for an additional restriction which stated "that the demonstrator shall be available at all times for the salesof merchandise." This referred to certain department stores who accepted more demonstrators than their toiletry departments could accommodate and used the excess as stock clerks or possibly bookkeepers. The approved retail drug code also contained a similar clause requesting that demonstrators be identified to the public.(******)

The approved perfume and cosmetic code was a compromise not only between the two opposing interests in the industry but between the industry as a whole and NRA. Whereas NRA refused to grant them the permissive right to contract for resale prices it did approve, at least in principle, practically all other provisions for which

---

(*) See Page 361 of Appendix for this provision.
(**) See page 361 of Appendix to this Report.
(***) See page 361 of Appendix to this Report.
(****) The AMTA dropped this idea of having demonstrators sign pledges.
(*****) See page 361 of Appendix to this Report.
(******) See Section 4(c) of Schedule (A) of Retail Trade Code.

they asked. The inter-industry fight in this industry over trade practice problems created more interest in this code than was seen in either of the other manufacturing groups. Interest continued after the code was finally approved and as a result and effective code authority was elected.

IV. THE PACKAGE MEDICINE CODE

After the effort to consolidate the three manufacturing codes had failed, the Package Medicine Code Committee still insisted that their definition should include cosmetics and toilet preparations. It was not until early in January, 1934 when their code was approved for public hearing that NRA succeeded in convincing the Code Committee that their code could not cover another branch of the industry. In the final approved definition, however, NRA lifted out of the cosmetic and toilet preparations code, dentrifices and mouth washes and placed them under the Package Medicine Code. (*)

The Package Medicine Code Committee was committed to the elaborate price-fixing scheme (**) which their original draft contained and it took until January, 1934 to get the Committee to agree that the plan should not go in the hearing draft of the code as a mandatory provision. The issue was finally settled by including the provision as a suggestion from the Code Committee to the Administration, preceded by the following instruction:

"Article VII - Prices

"In the general interest of the industry and of the entire trade, including wholesale and retail distributors, so that there will be free and unimpeded distribution of its products not to the end or extent that there be established a monopoly therein, not to the end or extent that consumers will be imposed upon, or manufacturers of other products be dealt with unfairly, but to the extent of freely supplying the consumer demand created by the member -- the Code Authority, subject to the approval and with the advice of the Administrator, may arrange for a conference of all interested parties dealing in package medicines, including wholesalers, or the Code Authority governing them, and retailers, or the Code Authority governing them, for the purpose of defining and establishing price standards which shall be fair and reasonable in relation to the nature and extent of the

---

(*) See Definition of Package Medicine Code, page 363 Appendix to this Report. This switch was made because most of the large manufacturers of dentrifices and mouth washes were members of the Package Medicine Trade Association. This definition should be examined as it illustrates the type of definition found in the three manufacturing drug codes in regard to covering four distinct sources for products.

(**) See Page 363 of Chapter I of this Part of the Report.

distributing services and functions rendered by each buying and selling class. Such price standards are to include all elements, such as, policies, terms, maximum or minimum discounts, and allowances.

"With the advice and consent of the Administrator after such price standards have been obtained as fair and just to all interested parties, the code authority, as well as the code authority for each branch of the trade, shall formally announce such price standards on the products of the industry.

"When the code authority, as well as the code authorities for wholesalers and retailers dealing in package medicines, announces the price standards established on the products of the industry, it shall be an unfair trade practice for such products to be sold other than as provided for in the price standards.

"As an aid in arriving at just, fair and proper price standards, the industry recommends for consideration the following principles: ....."

The principles then enumerated were practically identical with the provisions set forth in Article V, Prices, of the original draft filed. (*) The Code Committee had but faint hope that NRA would approve the price standard principle for the industry, let alone the suggestion set forth in the hearing draft of the code as a guide for determining such standards. However, the package medicine industry, as a whole, had voted on this price plan and instructed the committee to demand its approval and the plan had to go into this draft in order to obtain the Committee's assent to the hearing.

The provision prohibiting imitations of products and restriction of purchases through legitimate channels so as to curb counterfeiting was omitted from the hearing draft. However, the restriction on repackaging a product remained. All provisions restricting and eliminating sale of private brand substitute merchandise were eliminated.

The public hearing on the Package Medicine and Perfume, Cosmetic and Other Toilet Preparations Codes was held on January 17, 1934. The definitions of both Codes were attacked because they went so far as to include retailers who sold private brand drug and toiletry products or who made them in their prescription departments; and a modification of these definitions was required. The definition in the proposed pharmaceutical code was likewise modified in the approved draft. The Perfume, Cosmetic and Other Toilet Preparations Code Committee accepted the modification without argument, (**),

---

(*) See page 346, Appendix to this Report, and also Chapter I of this Part for a discussion of this price plan.

(**) See Article II, Section 1(b) of the Pharmaceutical and Biological Industry Code, #529. Also see Article II, Section 1(d) of the Perfume, Cosmetic and Other Toilet Preparations Code, #361.

but the Package Medicine Code Committee took a decided stand against it. Final approval of the latter code was delayed about four weeks because NRA officials would not send the code up for approval so long as it covered retailers and the Package Medicine Committee would not assent to a clause taking retailers out of the definition. Finally, to expedite the code, the NRA official in charge sent the code up for approval without this clause; but when the Administrator approved the Code, on May 17, 1934, he included the clause as a condition in his order of approval. (*) The Package Medicine Code Committee's objection to this clause seemed lodged in the notion that, if all retailers who marketed their own brands of package medicines were under the Package Medicine Code there would be some control over substitution, switching and other practices from which the nationally advertised products suffered. Although the final draft of their code contained no provision bearing on the sale of private brands, they perhaps felt that some future amendment might affect the situation.

In post-hearing negotiations, NRA suggested that the Package Medicine Committee adopt an open price plan similar to the one approved in the Perfume, Cosmetic and Other Toilet Preparations Code to replace the Committee's suggested price standards. They finally followed this suggestion, but the open price system upon which they agreed was not as comprehensive as the one in the Perfume & Cosmetic Code. (**) The rest of the trade practice provisions in the approved Package Medicine Code had only a minor effect on price stabilization.

(*) See page 365, Appendix to this Report.
(**) See Page 360, Appendix to this Report.

V. THE WHOLESALE DRUG CODE

The Wholesale Drug Code Committee refused to assent to NRA's request that the code contain a basic forty-hour week such as was approved in the General Wholesale Code. NRA, likewise, refused to approve a forty-five hour week and at the same time would not impose the forty-hour limitation on the trade without its consent. Therefore, after extended negotiations, no code was ever approved for the trade and, furthermore, the wholesale druggists succeeded in staying out from under the terms of the General Wholesale Code whose definition technically included them. This controversy illuminates certain aspects of the NRA administrative experience, but is not germane to this study. We shall touch only on the various price provisions appearing in the many drafts of the proposed code. (*)

One of the main reasons why NRA was unsuccessful in obtaining the assent of the Code Committee to the forty-hour week was the lack of a satisfactory price provision for which the trade, in exchange, might have been willing to make labor concessions. If the wholesale drug trade had been more closely united instead of being split fundamentally between the "service", "cooperative" and "cut-price" types of wholesalers, the result might have been different. As it was, it seemed impossible to draft a "selling below cost" or loss limitation provision beneficial to all three groups.

NRA began rather early to eliminate the possible selling below cost provisions. Many shifts of policy and model cost provisions were drafted, but almost always they appeared to be unworkable or of no use to the trade involved. The "cost-sold" idea which appeared in the original draft submitted by the National Wholesale Druggists' Association was early discarded. (**)

In the draft of the code at the first hearing on March 15, 1934,(***) there appeared a selling-below-cost provision based on the costs of the individual wholesaler. This provision was to go into effect after the code authority had received from the Administration approval of a cost-accounting system to be used by the individual wholesaler in determining his cost. (****) This draft also contained a provision giving the wholesale drug code authority the permissive right to arrange a conference of

---

(*) For a more thorough account of the negotiations of this code, see the Code History of the Wholesale Drug Code.

(**) See page 355of Appendix to this Report and Chapter I of this Part.

(***) There were two public hearings on the Wholesale Drug Code. Both drafts were different. The first hearing had to be set aside as the NWDA who sponsored the code had inequitable restrictions on membership and refused to amend their by-laws to meet the NRA requirement. The second hearing on June 25, 1934, was held on the code sponsored by the code committee which had been elected by vote of the entire trade.

(****)See page 366of Appendix to this Report.

interested parties for the purpose of establishing price differentials. Upon NRA's approval of these price differentials it would then become an unfair practice for a wholesaler to handle the products of a manufacturer who refused to adhere to the particular differentials applicable to his products. (*) This clause was identical with that approved in the General Wholesale Code on January 13, 1934. (**) There were no other clauses in the March 15 draft of the Wholesale Drug Code directly bearing on price stabilization. In the June 25th hearing draft of the code both selling-below-cost and price differential provisions were omitted. The two separate Code Committees sponsoring the Wholesale Drug Code were lukewarm about both of these provisions. The price differential provision was included in the March 15 draft, principally because it had already been approved in the General Wholesale Code and not because the wholesale druggists especially liked it. By the time of the June 25th hearing, NRA had adopted a definite policy of not approving the type of selling-below-cost provision that appeared in the March 15th draft of the code. Hence again the Code Committees did not put up much of a fight because the National Wholesale Druggists' faction thought such a provision ineffective and the Federal Wholesale Druggists' faction was afraid of all selling-below-cost clauses.

In the final presession draft of the Wholesale Drug Code dated August 28, 1934 (***) there appeared only one provision of interest to this discussion. We have already examined the preamble and trade practice provisions in the code originally presented by the Allied Wholesale Druggists' Association, (****) illustrating the desire of this Association to have the government curb the refusal-to-sell policies of manufacturers. At both hearings on the Wholesale Drug Code, members of the allied group presented testimony accusing members of the NWDA of collusion with manufacturers to cut off wholesale and retail distributors. (*****) It was well known in the drug industry that the FTC was conducting an investigation of the NWDA, the Drug Institute, and certain chain store groups in relation to the refusal-to-sell movement of 1933. Certain members of the Code Committee desired a clause in the code relating to this subject, and as a result, the following appeared in the draft of August 28, 1934:

(*) See page 366 Appendix to this Report.

(**) Several conferences were held under the terms of this provision in the General Wholesale Code, but no set of price differentials was ever approved as a result.

(***) See copy in Deputy's files of Wholesale Drug Code.

(****) See page 350 Chapter I this Part of the Report.

(*****) See transcripts of the March 15 and June 25 (1934) hearings for the Wholesale Drug Trade in Code Record. Members of the NWDA emphatically denied any such efforts on their part to persuade manufacturers to cut off distributors.

"Rule 11. No member of the Trade, in concert with another member or members thereof, shall, by threat, express or implied, of refusal to deal, or by other unlawful conduct, induce or attempt to induce or require any manufacturer of proprietary medicines, cosmetics, toilet preparations, drugs, medicinal oils, chemicals, pharmaceutical or biological products, or druggists sundries to refrain or to agree to refrain from selling any of said articles to any other member or members of the Trade; provided that nothing in this section shall be construed to suspend any of the provisions of the anti-trust laws of the United States."

While the NRA was endeavoring to work out some reconciliation with the Wholesale Drug Committee so that it would accept a maximum forty-hour week provision the Committee members from the N.W.D.A. were negotiating with the Federal Trade Commission for a Fair Trade Conference. A conference was set by the Federal Trade Commission for December 6, 1934 and because of lack of liaison between the two agencies, N.R.A. was not informed of these negotiations. This was the first Fair Trade Conference scheduled by the Commission after the advent of N.I.R.A. and as a result some publicity was given in the press (*) to the effect that the Wholesale Drug Trade had succeeded in sidestepping the regimentation of the NRA and would receive from the Federal Trade Commission all the fair trade rules it needed.

The Conference rules were approved one week after the conference was held. (**) Only three of these rules were redrafted before final approval and these changes were slight. (***)

Twenty-one Group I Rules and nine Group II Rules were approved by the Commission. (****) Group I Rules approved by the Commission "express unfair methods of competition while Group II condemn trade abuses and unethical and wasteful practices. (*****)

(*) See New York Herald Tribune and Washington Post of Nov. 22, 1934.

(**) According to Drug Trade News of December 24, 1934, "Veteran observers of Federal Trade Commission operation here cannot recall an instance where the Commission worked so expeditiously in approving a set of trade practice rules. Ordinarily, months and sometimes a year or more elapse before the Commission approves rules following their adoption at a conference."

(***) Ibid

(****) See Page 367 Appendix to this Report.

(*****) From June 30, 1933 Federal Trade Commission report "Trade Practice Conferences."

Of the twenty-one rules in Group One, the following two pertaining to selling below cost are of interest to this discussion:

"Rule 3 -- Selling Below Cost -- The selling of goods below cost, with the intent and with the effect of injuring a competitor and where the effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade, is an unfair trade practice.

"Rule 13 -- The practice of certain wholesale druggists of shipping and selling certain classes of merchandise in to the marketing territories of competitors below cost, where the effect may be to greatly injure competitors, to substantially lessen competition, or tend to create a monopoly, is an unfair trade practice."

Negotiations for the Wholesale Drug Code came practically to a standstill after the Federal Trade Commission rules were approved. The National Industrial Recovery Board inherited the problem of imposing a code on this trade, but they, like the Administrator, did not do so.

S U M M A R Y

None of the provisions originally requested in the manufacturing and wholesaling drug codes designed to stabilize resale prices or to prevent selling below cost was approved by NRA. In the approved Retail Drug Code appeared the Loss Limitation Provision substituted by NRA for the many price plans the retailers had requested. It will be seen that many of the retailers' stabilization suggestions were identical or complementary to provisions in the manufacturers' and wholesalers' codes.

The Retail Drug Code was approved long before the other drug codes went to public hearing, yet their code committees insisted that the principles at least of their price plans be incorporated in the hearing drafts of their codes. In order to make progress with these codes NRA officials permitted them to be heard while they still contained tabooed price provisions.

The Wholesale Drug Trade was successful in staying out from under a code and, while negotiations were still supposed to be continuing, obtained Fair Trade Conference Rules from the Federal Trade Commission. The negotiations for this code reached the point where the only possibility of a code lay in NRA's imposing labor provisions on the Trade. The Administrator refused to act in the matter as did also the National Industrial Recovery Board.

PART II

THE LOSS LIMITATION PROVISION OF THE RETAIL DRUG CODE 1/

CHAPTER I. INTRODUCTION

I. The Code's Place in the Entire Price Stabilization Picture

The previous part of this report has traced the price stabilization efforts of the drug industry through illegal resale price contracts, unsuccessful attempts to legalize them, and successive waves of selective distribution. In June, 1933, while the retail druggists were pushing a Federal resale price contract bill, Congress passed the National Industrial Recovery Act and the President announced that one of its objects was to curb the unfair practices of the predatory 10% in each industry and bring prosperity to the honest 90%.

The small druggists felt that the President's speech was directed particularly to them. They felt that they represented 90% of their trade and that the cut-rate druggists were the predatory 10% to whom the President referred. *

NRA, to the small druggists, meant primarily a new chance for price stabilization by Federal means; and while they favored the principles of re-employment and increased purchasing power, these things seemed incidental. They temporarily laid aside their other price control efforts and concentrated on drafting a code.

II. Fundamental Pricing Structure of the Drug Industry

Prerequisite to an understanding of the loss limitation provision of the retail drug code is a knowledge of the fundamental pricing structure of the drug industry. The basis of this structure is a price known as the "manufacturer's wholesale list price per dozen", quoted by practically every producer of identified package medicine and cosmetic products** as his indication of the product's value in dozen lots at wholesale, and as a base for the calculation of all discounts.

1/ Prepared by Sumner S. Kittelle

* That the small druggists felt that the President's speech especially applicable to them, is illustrated by several hundred druggists' telegrams in NRA files in the following terms: "As a member of the 90% pledging support to your program, I respectfully urge you to sign the Retail Drug Code." Also: "Understand the unfair 10% at present delaying the signing of Retail Drug Code. Is this in keeping with the spirit of NRA?..."

** The price structure of pharmaceutical manufacturers differed from that described herein. See Chapter VI of this part - Administrative Problems - Page 130

Ordinarily, the manufacturer's wholesale price per dozen is 33-1/3% below the manufacturer's consumers price, printed on the package or featured in advertisements as an indication of value to the consumer. Also, the manufacturer's wholesale price per dozen is, on the majority of products, the cost to the small retailer buying from the wholesaler in dozen or less than dozen lots.

As far as the manufacturer is concerned, his wholesale list price per dozen is not his own selling price, for he rarely sells in lots as small as one dozen. However, when he sells large quantities to wholesalers or big retailers, he bills the goods at the manufacturer's wholesale list price per dozen and then deducts his quantity and cash discounts, amounting usually to 15% and 2%. Likewise, if the wholesaler sells to retailers at a cut price, he bills the goods at the manufacturer's wholesale list price per dozen less discounts, thus maintaining this list price as the basis for all price computations in the industry.

As an example of how the pricing structure would work if there were no price cutting and no extra discounts allowed either by manufacturers or wholesalers, a hair tonic with a consumer price of $1.00 printed on the package would have a manufacturer's wholesale list price per dozen of 66-2/3¢ ($1.00 less 33-1/3%). Small druggists would buy it from their wholesalers at this price, and wholesalers and large retailers would buy it in quantity from the manufacturer at a reduction of 15% and 2% or at about 55⅓¢. If there were no price cutting at retail, large retailers and small alike would sell the tonic for $1.00, the former making a gross profit of 44 ⅓% (mark-up of 80%) and the latter making a gross profit of 33-1/3% (mark-up of 50%).

Price cutting at retail changes this situation. Large retailers buying at 55⅓¢ can sell at or below the manufacturer's wholesale list price and still make a gross profit. If the small retailer meets their prices, he makes no gross profit and may take a loss on the cost of his goods. If he fails to meet their prices, he may lose his trade. Pressure of price cutting on small retailers caused them to demand cut prices from their wholesalers, and these, coerced by competition among themselves, acceded to the demand and allowed discounts from 5% to 10% below the manufacturer's wholesale list price per dozen. Some retailers formed or joined cooperative or mutual wholesale houses for the purpose of enjoying the advantages of mass buying. This movement in the drug trade, however, has never been as widespread as in the grocery trade, principally because small druggists owe so much money to their service wholesalers that they are obliged to continue buying from them. Such mutual and cooperative wholesalers as exist, usually do not handle a complete stock of products.

Deviations by manufacturers from the normal discounts also complicate the price situation in the industry. Secret discounts and rebates to chains and large retailers, and indirect price concessions such as payment for advertising and window display tend to increase the differential between the cost of the goods to the small and the larger dealer. Manufacturers' offers, through the wholesaler, of discounts

and free goods in dozen lots, tend to decrease this differential. But regardless of these deviations from the usual pricing structure and regardless of how manufacturers' and wholesalers' price concessions may change, the basis of calculation remains the manufacturer's wholesale list price per dozen.

CHAPTER II. ALIGNMENT OF OPPOSING FORCES

1. Proponents of Price Stabilization

From the presentation of the original code to NRA in August 1933, and throughout the code period, the principal backers of price stabilization were the associations representing the small, independent druggists who did not initiate price cutting and who disliked being forced to meet cut-rate competition. These druggists, numbering about 50,000, took seriously the professional aspects of their business, especially their prescription departments.*

Three national trade associations represented the small druggists: The National Association of Retail Druggists (NARD), the American Pharmaceutical Association, (APHA), and the Drug Institute of America, Inc.** The NARD had a total membership of about 35,000 druggists, principally derived from its affiliated State Pharmaceutical Associations and local retail drug associations in cities. This association had always been militantly in favor of price stabilization, fighting and lobbying for it in state legislatures and in Congress. In its official application for a code in 1933, it submitted the following figures:***

	Annual Volume of Business	
Total for trade	$1,300,000,000	- 100%
Members of Association	784,482,758	- 60-10/29%
Non-members	515,517,241	- 39-19/29%

The American Pharmaceutical Association was affiliated with the same State Pharmaceutical Associations as the National Association of Retail Druggists but was not affiliated directly with the local retail drug associations. The affiliated memberships of the American Pharmaceutical Association and the National Association of Retail Druggists thus overlapped greatly, being about 35,000. In addition to its affiliated membership, the American Pharmaceutical Association had a direct membership of about 3,000. This association emphasised the professional rather than the commercial side of the drug store and had a high, ethical standing. It admitted pharmacists to membership whether they owned stores or were merely employees; and it also admitted professors of pharmacy and scientists. Inasmuch as the success of the professional side of pharmacy depended considerably upon the success of the commercial side, the A.Ph.A. saw very nearly eye to eye with the N.A.R.D. on the issue of price stabilization.

(*) Throughout this part the term "small druggist" designates the type described above. The term "independent druggist" is somewhat misleading inasmuch as many of the cut-rate type were independent i.e., not chains.

(**) The following descriptive data on all trade associations comes from the History of the Retail Drug Code, pp. 13 to 16.

(***) Volume A, Retail Drug Code; Code Record Section files.

The Drug Institute of America, Inc., was organized in 1933, shortly before the passage of the N.I.R.A.; and its principal object was to promote price stabilization for the entire industry. With this in view, it admitted to membership manufacturers, wholesalers and retailers, the membership of the last-named class being about 30,000 and including both chains and small druggists. Its membership was entirely direct, it having no affiliation with local or state associations, and its members joined as individuals and not as corporations or firms. Powerful during the code period, the Drug Institute declined rapidly after the Schechter decision and is now out of existence.

At the original public hearing on the retail drug code in August 1933, one of the most significant speakers on behalf of price stabilization was Mr. George H. Gales, president of the Liggett Drug Company. From the time of their inception, chains had been the opponents of small druggists, but students of the retail drug trade had noticed a trend toward a new spirit of cooperation between chain and small druggist in the latter's fight for price protection.

Chains had established their places in the economic field through aggressive price cutting, but the process involved price wars and the resulting competition became cut-throat. Once established, the chains saw possibilities of more profitable operation under price stabilization, and commenced to view with approbation the efforts of small druggists in this behalf. A new type of outlet entering the market during or just prior to the depression hastened this tendency. This type was an independent store, or small local chain of low overhead, high volume, and a policy of extremely low-cut prices. These outlets could beat the established chain at its own price-cutting game.*

Shortly after the original public hearing, Mr. Gales became president of the National Association of Chain Drug Stores and, as such, took a seat on the National Retail Drug Code Authority. From that time, the most of the important national chains were openly behind the program of price stabilization. The National Association of Chain Drug Stores arose from a merger of two pre-existing organizations, the Affiliated Chain Stores Association and the Associated Chain Stores Association, and admitted to membership any firm operating a chain of four or more stores. Its members included the largest and best-known drug chain systems in the country.

II. Opponents of Price Stabilization

The opponents of price stabilization throughout the code period were of two classes: The cut-rate drug or cosmetic stores, and the department stores. The first type consisted of medium-sized or large independent drug stores; small drug chains, usually local in extent; and so-called cosmetic shops, either chain or independent. Some of the drug stores had sizeable prescription departments, doing a good volume of business; others did not emphasize their prescription business, and still others had no prescription departments.

(*) For a further discussion of this subject, see Part I of this Report -- Page 12 et. seq.

The cosmetic shops did not fill prescriptions, though where state and local law permitted, they may have handled packaged medicines as well as cosmetics.

Some representatives of the small druggists at the public hearings applied the term "pine board" indiscriminately to all of their cut-rate opponents, and this term was sometimes misleading. Strictly applied, the term "pine board" refers to a type of store, developed in California, with cheap shelving and counters, usually made of pine instead of a more expensive wood. These stores cut down their overhead by occupying cheaper down-town locations, usually in the middle of the block and frequently at distress rentals made possible by the depression. Often they were mere "holes in the wall", filled to the bursting point with goods, operated on a cash and carry basis, and with no prescription service. A large number of "pine boards" were at the time of the code, and no doubt still are, in existence; but it was a mistake to classify all cut-rate drug establishments by this title, since many of them had locations and fixtures as fine as any drug store, and some had large prescription departments. The common denominator of the cut-raters was not cheapness of location or fixtures, nor lack of prescription service, but rather a policy of extremely deep-price cutting on nationally-advertised merchandise and the handling of a rather complete line of private brand, substitute products. There was nothing new about the basic policy of the cut-rate store. It featured a number of standard items at low prices to draw trade, and attempted to sell the customers private brand merchandise in lieu of or in addition to the standard brand. This was the policy that established the chain drug store's place in the community, but there were differences between the chain and the cut-rater in the method of carrying out the policy. The chains had sufficient funds to use newspaper and radio advertising, and considered such publicity necessary to the continuance of their goodwill. The cut-raters, having less capital, needed another mode of attracting notice, and they found it in the medium of prices cut so extravagantly low that they advertised themselves by word of mouth. A few handbills judiciously distributed at nominal cost sometimes supplemented the prices posted in the store window.*

Possibly another factor on the side of the cut-rate store in its battle with the chain was the former's small size. The chain was an organization with hired store managers who were often not permitted to change prices without direction from the head office. The cut-rate store manager was the owner, usually a shrewd merchant with a knack for shifting prices effectively, and not restricted from doing so by any higher authority. Furthermore, though the volume of business of the cut-rater was large enough to enable him to buy directly from manufacturers at low prices, his stocks were not so large that he was limited to this one source of supply. Being an independent, he could personally watch for bargains, especially in distress goods, on quantities too small to interest the chain.

(*) The author thanks Mr. Wroe Alderson, consultant on this study, for the following terse statement of the distinction between the policies of chains and cut-raters: "Cut prices are what the chains advertise, but cut-prices are what the cut-raters advertise with".

During the code period, there was no national association of cut-rate drug stores, and only two associations appeared at the hearings. One of these was the National Independent Pharmacists, Inc., having a membership, by its own figures*, of about 75 stores in New York City with an annual volume of business between $7,500,000 and $12,000,000. According to this association's attorney, very few of these stores dealt in cigars or cigarettes, and few had soda fountains or luncheonettes. Their average prescription business was from $50 to $100 per day per store and they sold for cash and went aggressively after trade. The attorney stated that this association was affiliated with similar groups throughout the country but named none of them.

During the spring of 1933, NRA sent a government representative to sit as administration member on the local retail drug code authority in New York City. This man, seeking knowledge of conditions in the trade, befriended and had many conversations with members of the National Independent Pharmacists, Inc. In his final report to the Deputy Administrator**, rendered after the Schechter decision, he stated: "I have personally visited many of these stores and found a great many of them to be of the highest type, with large prescription departments, finest of fixtures and handling nothing but drug and cosmetic items."

Another cut-rate association represented at the public hearings was The Associated Retail Druggists of America. The size of this group was difficult to determine. The spokesman for it was Mr. Maurice Singer of Cleveland, Ohio, and at the first hearing in August, 1933, he gave the title of his association as set forth above.*** At the second hearing in June, 1934, however, he called it the "Association of Retail Druggists, Cleveland, Ohio".**** At the first hearing Mr. Singer stated that his association contained stores in twelve or more large midwestern cities, some of the stores being independent and some small chains, and all doing a large volume of business. At the second hearing, he further described his group as containing 200 to 300 stores.

(*) See testimony of Miss Frances Kneitel, attorney for this group, transcript of hearing August 26, 1933, pages 338 to 342; and transcript of hearing of June 7, 1934, pages 304-335

(**) Report of Walter P. Spreckels, Administration Member, to A.S. Donaldson, Deputy Administrator, July 29, 1935; "Administration members" folder, Deputy's files.

(***) Transcript of hearing, August 26, 1933; pages 336 to 365

(****) Transcript of hearing, June 7, 1934, pages 124 to 135

small cut-rate drug and cosmetic stores, the department stores consistently opposed price stabilization throughout the code period. The association representing this group was the National Retail Dry Goods Association, having, according to its representative, (*) a membership of 4,565 department stores and specialty shops, most of them selling drugs and cosmetics. This association's opposition to price control by the Government extended beyond the Retail Drug Code. It sent its representative to register its objections at practically every hearing on any code involving price devices. It appeared before the congressional committee considering the Capper-Kelly bill and objected to that measure while it was pending.

In addition to the above-named trade association, two individual firms, important enough to warrant mentioning, appeared to object to price stabilization at both public hearings on the Retail Drug Code. One of these firms was R.H. Macy & Company, a large department store in New York City. This firm achieved renown through its policy of selling exclusively for cash and its allegations that it endeavor to undersell all competitors by 6%. Its drug and cosmetic department was cut-rate in its tactics and, prior to the code, greatly disturbed the small druggists of New York. This firm employed an economist and also a Washington attorney, one or both of whom appeared at all hearings on price control to submit the company's objections. During the code period, Macy frequently threatened to violate the loss limitation provision, and expressed consistent objections to it, but actually remained in compliance. Another individual firm represented at the hearings was the Katz Drug Company of Kansas City. According to its representative, it had, in June 1934, eight stores, five in Kansas City, Missouri one in Kansas City, Kansas, one in St. Joseph, Missouri, and one in Iowa. (**) Druggists of Kansas City questioned Katz's right to call its establishments drug stores because of the great variety of merchandise handled. Late in 1934, or early in 1935, Katz built a new "Super Service" drug store in Kansas City, carrying so great a variety of articles that druggists of the city promptly classified it as a department store. (***) Katz consistently opposed all price control measures in the codes, and even succeeded in obtaining an injunction preventing the enforcement of the price provisions of the Cigar Code. Though it disliked the loss limitation provision of the Retail Drug Code, its Washington attorney assured NRA that Katz would comply; and available records show no outright violations by this firm.

(*) See testimony of Irving O. Fox, transcript of hearing of June 7, 1934; pages 247-261

(**) See testimony of Paul Stinson, transcript of hearing of June 7, 1934; pages 261-266

(***) To the layman, the dividing line between drug store and department store seems somewhat obscure. Drug stores, apparently, can sell electric irons, flashlights, cameras and toys, but not awnings, clothing and refrigerators without becoming, in the minds of other druggists, department stores.

CHAPTER III

HISTORICAL DEVELOPMENT OF THE LOSS LIMITATION PROVISION TO THE ACT OF MARCH, 1934

I. Trade Activities in Summer of 1933

The National Association of Retail Druggists and the Drug Institute of America, Inc., commenced formulating a code soon after the passage of the National Industrial Recovery Act. NRA records indicate that a number of State Pharmaceutical Associations presented separate codes also but, the principal effort lay in the drafting of a single code by the national bodies. Though the Drug Institute had participated prominently in the drafting of the proposed code, it came to NRA in the name of the National Association of Retail Druggists. The American Pharmaceutical Association joined in the presentation, not as sponsor, but as an assenting group.

II. Presentation of Code; Public Hearing; Subsequent Drafts

NRA received the proposed code on August 11, 1933,(*) and scheduled a public hearing for August 25. Shortly before the hearing, the National Association of Retail Druggists withdrew the original draft and substituted a new one,(**) and at the hearing all arguments and testimony were based upon the new, substituted draft, reading in substance as follows in its price control provision:-(***)

(a) Retailers shall not receive or accept any secret rebates, unearned discounts or similar concessions from manufacturers. Payments by manufacturers to retailers for window display shall be in cash and not contingent on the amount of goods bought.

(b) Trading allowances or premiums to consumers are prohibited unless the consumers pay for them at the code minimum price. But druggists can sell to doctors at a "different" price.

(c) No trading stamps or other schemes or subterfuges to evade the code minimum prices are permitted. Special sales cannot be held unless prior approval of the "Enforcement Board" is obtained.

(d) Combination sales are not prohibited if the total price covers the code minimum prices of the constituent items.

(*) See official application for code, Volume A, Retail Drug Code, Code Record Section, NRA

(**) The sponsors apparently withdrew every copy of the original draft in NRA's possession. The author has not been able to find the reason for the substitution, nor to obtain copies of the first draft.

(***) This draft appears at page 38, transcript of hearing.

(e) No manufacturer or wholesaler can sell to anyone, including hospitals, at a price less than he sells to retailer, if such goods are to be resold.

(f) No retailer can sell or offer to sell below "cost sold" plus 5% net profit. "Cost sold" is defined as the "standard wholesale cost" fixed by the manufacturer(*) plus the average drugstore overhead as determined by the St. Louis drug store survey of the Department of Commerce (about 23%).

(g) A grower, producer or dealer who sells goods identified by a special brand, name or trade mark of which he is the owner, is permitted to specify the resale price of such goods by agreement with his distributors. The prices stipulated must be uniform to all distributors, who are in like circumstances; and such contracts are to be free from the anti-trust laws.

Clauses (f) and (g) were the most important to the sponsors; the intent of the others was merely to plug up possible loopholes and to bring about incidental benefits. Items (e) and (g) and part of item (a) would have controlled manufacturers and wholesalers though this code was supposed to govern retailers only. For this reason, Mr. Donald Richberg, then General Counsel of NRA, arose at the start of the hearing and attacked the legality of the draft.(**) Later, however, Mr. Wroe Alderson, then Industrial Adviser to the drug trade, commented that the attempt to control manufacturers was a significant symptom, since elimination of bad retail price conditions necessitated some control over, or cooperation by manufacturers and wholesalers.(***)

The public hearing lasted two days and during the intervening evening the sponsors revised the code to accord with Mr. Richberg's views and to modify their demands for price protection. This revision, read into the record on August 26, changed the wording of the resale price contract clause so as to permit retailers to enter into contracts with manufacturers, instead of manufacturers with retailers. To render such a clause as this workable, there would have been need for a similar clause in the codes covering drug manufacturers.(****) This revised draft of the code abandoned the "cost sold plus 5 " clause and included in its

---

(*) The phrase "standard wholesale cost fixed by the manufacturer" evidently means the manufacturer's wholesale list price per dozen.

(**) Mr. Richberg's attack appears on pages 49 to 58 of the transcript of August 25, 1933. Mr. Richberg also attacked these clauses on the ground that NRA'S legal right to approve price-fixing clauses was doubtful.

(***) Mr. Alderson's comment appears in the Final Report of the Industrial Adviser (undated), addressed to A.D. Whiteside, Deputy Administrator. A copy is in folder marked "157 Retail-Code Doc."; Deputy's files.

(****) See Part I for discussion of efforts to secure such a clause in one of these codes, Page 12 et. seq.

place a clause substantially as follows:

> Retail druggists are prohibited from offering or selling merchandise at less than the manufacturer's published or declared retail (consumer's) price less 21%. If, however, a manufacturer of a particular product does not provide the usual retail margin of 33-1/3%, the minimum code price is to be the manufacturer's wholesale list price per dozen plus a percentage mark-up to be determined later. Taxes are to be added and not absorbed. (*)

This clause (commonly known as the "21% clause") meant that the minimum price of a $1.00 hair tonic would be $79¢. But if the manufacturer's wholesale list price per dozen of the hair tonic was less than 33-1/3% below the retail price (i.e., greater than 66-2/3¢), the minimum code price would be the manufacturer's wholesale list price per dozen plus a mark-up to be determined later. This clause represented a much lower degree of price protection than the original "cost sold plus 5%" clause. Under the "cost sold" clause, a $1.00 hair tonic would have had a minimum price of $1.00 (manufacturer's wholesale list price per dozen of 66-2/3¢; plus 28% of the selling price for overhead, or about 28¢; plus 5% of the selling price for net profit, or about 5¢; total about 99-2/3¢).

The report of Deputy Administrator A. D. Whiteside to General Johnson on "Outstanding Impressions Drawn from the General Retail and Retail Drug Trade Hearings" (**) shows the attitude at least of the administrative officers of NRA toward the druggists' proposals. Mr. Whiteside stated that while the retailers admitted the depression was the principal cause of their operating losses, they still insisted on a loss limitation provision, and that they could not abide by code labor provisions without price protection. He stated that the loss limitation idea was so popular with retailers that, irrespective of economic implications, a denial of the retailers' request might have serious results at the crucial point of NRA's inception, and the decision in the matter might have a decided bearing on NRA's success. Mr. Whiteside pointed out that the mere setting of uniform wages and hours would not, in retailing, result in curbing price cutting to the same degree as in manufacturing. He added that, under price stabilization the aggregate cost of goods to the consumer should not go up because of the small number of loss leader items.

On September 8, 1933, after numerous conferences (***) the sponsors revised the price control provisions of the code again, compromising still further their desire for a high degree of price protection.

(*) This second draft appears in full at page 404, et seq., of the transcript of August 26, 1933. Note that each day of the hearing had its own volume of the transcript, but page numbers ran continuously through both volumes

(**) Dated September 14, 1933. Located in files on Retail Trade Code; also in History of Retail Trade Code, Beginning at page 30

(***) There is no record of the actual proceedings at informal conferences

The two important price clauses in this draft were substantially as follows:

> Drug merchandise cannot be sold at less than the manufacturer's wholesale list price per dozen as of the date of sale or 3 months prior thereto, whichever is lower, less such discounts as are available to all, plus 15%. Druggists cannot hold more than one seasonal clearance sale per quarter and must report it in advance to the code authority. Perishable and damaged goods can be sold below the minimum price if advertised, marked and sold as perishable or damaged. Bona fide discontinued lines, goods sold on complete final liquidation of a business, and foods sold for charitable purposes can be sold below the minimum. Before selling anything below the minimum, the druggist must first offer it back to the manufacturer at 10% below the price paid for the goods by the druggist.
>
> Retailers may enter into resale price contracts with manufacturers but only on commodities the manufacture of which is subject to an NRA code, and the contracts must be approved by the code authority, the Administrator of NRA, and the President under Section 4(a) of NRA. Clearance sales are permitted if the manufacturer is first given an opportunity to re-purchase the goods.

The first clause mentioned above would have made the minimum price of a $1.00 hair tonic about 77¢ (manufacturer's wholesale list price per dozen of 66-2/3¢ plus 15%) less whatever discounts were "available to all". These discounts might have totaled as much as 25% on a few products, while on most there would have been no discount "available to all", but only a discount available to buyers of large quantities.

The resale price contracts clause in this draft was so hedged with restrictions that it would hardly have been practical. (*) Negotiations between NRA and the trade continued throughout September. NRA's administrative staff was not averse to granting some price protection in the code, provided it did not go so far as to injure the public, and the Industrial Adviser shared this view to the extent of recommending price protection in order to keep small druggists cooperating with NRA. (**) Other interests in NRA, on the other hand, notably the Consumers' Advisory Board, were opposed to any price control clauses at all. (***) The representatives of the small druggists, naturally, wanted as much price protection as they could secure. The attempt to compromise these diverse views accounts for the frequent changes in the proposed code.

(*) Copy of draft of September 8 is in Volume A, Retail Drug Code, Code Record Section, NRA

(**) See interim report of Wroe Alderson to A. D. Whiteside, September 9, 1933; Volume A, Retail Drug Code; Code Record Section filed

(***) See report of William Loucks to A.D.Whiteside,September 14,1933, Volume A, Retail Drug Code, Code Record Section files

The druggists started with a bold proposal and gradually reduced their demands.

In the next draft, on September 15, 1933, the druggists regained some ground on their minimum price clause, but at the expense of giving up their resale contract clause altogether. The minimum price clause in this draft provided in substance as follows:

(a) On standard brands (well-known nationally advertised products), the code minimum price is the manufacturer's retail list price (full consumer's price) less 21%.

(b) On off-brands (not highly advertised or well-known), the code minimum price is the lowest wholesale net price quoted to all retailers within 30 days preceding the date of sale, plus 10%.

(c) Clearance sales must be bona fide and can be held only at the end of a "well recognized season". (Other conditions under which goods could be sold below the code price remained the same as in the preceding draft. The retailer was required to give the manufacturer an opportunity to repurchase the goods before cutting the price).

The re-gained ground here was the re-acquisition of the "21% clause", but the gain was limited to standard brands. The provision concerning off-brands would have produced a fluctuating price very difficult of determination. (*) Two more preliminary drafts appear in the records, bearing the dates September 19 and September 21, respectively, but contain no substantial changes in the price provisions. (**) The last draft on record containing price provisions in line with those developed during the negotiations since the hearing was a draft transmitted by Deputy Administrator Whiteside to the Administrator for approval on October 1, 1933. It contained the "21% clause", but limited its application to trade marked, trade named, or advertised goods, readily identifiable by the consumer. On other goods the minimum price was the individual store's cost of the goods plus a mark-up of either 10% regardless of the source of the goods, or 10% on goods purchased directly from manufacturers, and 7% on goods bought from wholesalers. (***) The Deputy, in his letter of transmittal to the Administrator, (****) urged the immediate approval of this draft, saying that the trade, except for a few price cutters, was aggressively in favor of loss

---

(*) Copy of the draft of September 15 appears in Volume A, Retail Drug Code, Code Record Section, NRA

(**) Copies of these drafts are in Volume A, Retail Drug Code, Code Record Section, NRA

(***) Parts of this draft are missing from the files and the record does not show which of the above alternatives was included in it.

(****) Copy of this letter and copy of parts of the code as transmitted are in folder marked "157-Retail-Code Doc.", Deputy's files

limitation and would smother NRA in an avalanche of criticism if it were denied. He warned of the serious political significance of such an avalanche. The Deputy further stated that labor leaders were in favor of the loss limitation provision and that the opposition of the Consumers' Advisory Board was based on an academic viewpoint.

The Deputy Administrator sent this draft to the Administrator in alternate forms: one, as a separate code, and the other as a part of the general retail code. The Deputy from the beginning had shown a desire to consolidate all retail codes and the retail drug trade had consistently opposed him on the ground that its problems were wholly dissimilar to those of hardware and dry goods stores. Apparently, in transmitting the code in alternate forms, the Deputy was leaving the decision to the Administrator.

Before looking at the differences between the code as transmitted for approval and the code as approved by the President, it is well to go back and examine the reaction of individuals in the field while the trade's representatives were in Washington negotiating with NRA.

III Reaction of Individuals; Mass Pressure

A flood of telegrams and letters to the President and NRA from druggists and local drug associations commenced in July 1933, prior to the presentation of the proposed retail drug code. (*) The immediate cause of this correspondence was the President's Re-Employment Agreement, setting hours and wages, but containing no trade practice provisions. Druggists wrote and wired by the hundreds to the effect that they could not continue operating under the "blanket Code" with no curb on "unfair cut-rate competition". From two cities in particular came a batch of telegrams to the President couched in identical language, (**) from apparently every small druggist in these places. Many of these sent the same telegram twice, once under their own names as druggists, and again under the names of their stores. After the presentation of the code and during the negotiations prior to its approval, the druggists were especially vociferous. A summary of mail received after publication of the proposed code in the newspapers (***) showed a total of 779 pieces of correspondence, with 719 in favor of the

---

(*) All of the correspondence mentioned in this Subsection is in the Deputy's files, scattered throughout a large number of folders, all bearing the legend "157-Retail".

(**) There were two forms of wording of these wires. One read "Cut-rate situation on tobacco, drugs deplorable here. Cannot give whole-hearted support unless relief comes". The other read, "Starvation wages, long hours will continue unless local cut-rate drug company allows living profit".

(***) Copy of the summary is in folder marked "157 Retail (a)," Deputy's files. The summary does not give the date of publication of the proposed code, but this was probably about the time of the public hearing, August 25, 1933. The summary shows the mail received from that date until September 25, 1933.

code as published, 51 opposed to the price maintenance provisions, 4 opposed to the hours provisions, and 5 miscellaneous objections. A count of correspondence received between September 25, 1933 (*) and the approval of the code revealed 484 letters and telegrams (with the latter predominating) asking the President or NRA to approve the price protection provisions requested by the sponsors. A large number of the telegrams were identical in wording though emanating from different parts of the country. Two examples appear in a footnote to the Chapter 1 of this part, showing that the small druggists felt themselves to be the "honest 90%"and the cut-raters the "predatory 10%" in their trade. Other examples of uniform wording of telegrams were: "Urging you not eliminate price protection clause retail drug code"; "Independent druggists cannot possibly pay higher wages and shorter hours unless 21% provision retained in drug code....."; and "The vicious 10% mark-up (**) over invoice cost will close the doors of 75% of retail druggists of nation. I petition you for release in form of right contract in retail drug code".

There is little doubt that much of the flood of correspondence was loosed at the instance of the drug associations and was not the spontaneous expression of the druggists individually. Uniformity of wording of telegrams bears out this conclusion. An interesting example appears in the consistent misspelling of the same word in all of the telegrams from one city. One druggist was naive enough to write a letter of confirmation of his telegram to the President, stating that the wire had been composed in response to a hurry call from the secretary of his state pharmaceutical association. (***) An interesting item among the mass of correspondence was a series of 28 identical mimeographed letters to General Johnson signed by individual consumers, and three consumers' petitions containing 52, 41 and 18 names, respectively. The tenor of these documents was that, while the writer was not connected in any way with the drug trade, he or she appreciated the value of the neighborhood druggist and realized his need of price protection. NRA acknowledged all of these letters, and in one case, the addressee replied that he had never written General Johnson in his life.

Among the miscellaneous correspondence received during the pre-approval period of the code were 139 letters from individual druggists urging a separate drug code rather than the inclusion of druggists under the general retail code. A large number of these were also uniform in wording. There were also three items from persons outside the retail drug trade. One of these, a telegram from the Utah Poultry Producers Cooperative Association, opposed, in behalf of the farmers, any resale price maintenance clauses in either the retail drug or general retail codes.

(*) Made in connection with the present study

(**) Referring, no doubt, to the attempts of NRA to place druggists on the same basis as general retailers under a "cost plus 10%" provision

(***) In view of the wholesale use of this type of lobbying by the druggists themselves, it is amusing to note that a number of their letters and telegrams warned NRA to beware of the lobbying activities of large interests.

Another, from the secretary of the National Wholesale Druggists Association, urged the approval of price protection in the retail drug code so that small retailers and wholesalers could stay in business and employ help. The third, from the president of the Proprietary Association of America, an organization of package medicine manufacturers, urged the approval of the "21% clause" in the retail drug code. (*)

(*) This association presented a code of its own to cover the manufacture of package medicines, containing an elaborate price maintenance plan. The plan provided, among other things, that retailers should not sell package medicines below the top consumer price less 21%. This plan was never approved. See Part I, Interplay of Interests in the Drug Industry, for a discussion of this code. Page 15 et.seq.

IV The Loss Limitation Provision as Approved by the President

On October 21, 1933, the President approved the Retail Trade Code covering both the general retail and retial drug trades. Attached to it was a schedule of additional provisions, applicable specially to the retail drug trade. A loss limitation provision appeared in the main body of the code applicable to both retailers and druggists, reading as follows:

"Article VIII, Section 1 - Loss Limitation Provision. In order to prevent unfair competition against local merchants, the use of the so-called "loss leader" is hereby declared to be an unfair trade practice. These "loss leaders" are articles often sold below cost by the merchant for the purpose of attracting trade. This practice results, of course, either in efforts by the merchant to make up the loss by charging more than a reasonable profit for other articles, or else in driving the small merchant with little capital out of legitimate business. It works back against the producer of raw materials on farms and in industry and against the labor so employed.

1. This declaration against the use of "loss leaders" by the storekeeper does not prohibit him from selling an article without any profit to himself. But the selling price of articles to the consumer should include an allowance for actual wages of store labor, to be fixed and published from time to time by the Trade Authority hereinafter established.

2. Such an allowance for labor need not be included in the selling price of any article of food, or be applied by storekeepers doing business only in communities of less than 2,500 population (according to the 1930 Census) which are not part of a larger trade area.

Provided, however, that any retailer may sell any article of merchandise at a price as low as the price set by any competitor in his trade area on merchandise which is identical or essentially the same, if such competitor's price is set in conformity with the foregoing provision. A retailer who thus reduces a price to meet a competitor's price as above defined shall not be deemed to have violated the provisions of this section if such retailer immediately notifies the nearest representative retail trade organization of such action and all facts pertinent thereto."

"Article VIII, Section 2 - Exceptions to Loss Limitation provision.
(a) Notwithstanding the provisions of the preceding Section, any retailer may sell at less than the prices specified above, merchandise sold as bona fide clearance, if advertised, marked and sold as such; highly perishable merchandise, which must

be promptly sold in order to forestall loss; imperfect or actually damaged merchandise, or bona fide discontinued lines of merchandise, if advertised, marked and sold as such; merchandise sold upon the complete final liquidation of any business; merchandise sold in quantity on contract to public carriers, departments of government, hospitals, schools and colleges, clubs, hotels, and other institutions, not for resale and not for redistribution to individuals; merchandise sold or donated for charitable purposes or to unemployment relief agencies; and drugs or drug sundries sold to physicians, nurses, dentists, veterinarians, or hospitals.

(b) Nothing in the provisions of the preceding Section shall be construed to prevent bona fide farmers' associations engaged in purchasing supplies and/or equipment for their membership from making patronage refunds to their membership.

(c) Where a bona fide premium or certificate representing a share in a premium is given away with any article the base upon which the minimum price of the article is calculated shall include the cost of the premium or share thereof.

A nine-page explanatory bulletin on the code, issued by NRA on October 28, 1933,(*) interpreted the loss limitation provision to mean that no retailer could sell merchandise below his actual net delivered cost, less discounts, or his current replacement cost, whichever was lower. Until NRA fixed a markup to cover labor costs, the code minimum price remained at bare merchandise cost. Inasmuch as individual costs differed small retailers with high costs could meet prices set by large retailers with low costs provided the latters' prices were not in violation of the code, and provided the small man notified the code authority of his action.

Why the retail druggists, against their will, were placed under the general retail code, and why their suggestions for price protection were ignored in spite of the Deputy's recommendation that they be approved, does not appear from the available files. Not until April 5, 1934, did NRA fix a labor mark-up for this loss limitation provision (**) and by that time the druggists had a new loss limitation provision of their own. The mark-up established was 10%

(*) Copy is in folder marked "157 Retail - Code Documents"; Deputy's files

(**) Administrative Order 60-26

V. Objections of Trade to Approved Provision

The sponsors of the code were far from satisfied with the approved loss limitation provision. George M. Gales, president of the Liggett Drug Company wrote Deputy Administrator Whiteside* that he was keenly disappointed at the rejection of the druggists' loss limitation sugrestions and the approval of cost plus a labor mark-up. The Assistant Deputy Administrator must have foreseen trouble with the officials of the National Association of Retail Druggists, for his telegram asking this association to appoint two members of the code authority pleaded with it not to refuse or it might "endanger what has been accomplished and what I know you still hope for".** The answer from the secretary of the N.A.R.D.*** stated, "Under protest we nevertheless are willing to cooperate with your department and John A. Goode and myself wil will be in Washington Friday morning to act as temporary representatives of N.A.R.D. on Retail Drug Council....."

Repercussions of this initial dissatisfaction continued at intervals throughout the life of the code. In January, 1934 N.R.A. issued a press release mentioning that the retail drug code was the result of an agreement between the trade and N.R.A.
The secretary of N.A.R.D. wrote the Assistant Deputy Administrator that the press statement was false, and that he, for one, had not agreed to any part of the code and at first intended not to have anything to do with it. He closed his letter by saying, "The Drug Code, in my opinion, is a disgrace for any government to try to put over or any group of men who are supposed to have any intelligence at all....."****

On October 4, 1934, this same trade association revived the matter by publishing in its journal an editorial***** stating that the trade never had a chance to assent to the approved code. The occasion for the editorial was a statement by the President of the United States on September 30, 1934 that each industry had been allowed to write its ideas into its code, and the editorial urged each druggist to write the President, correcting him. A number of such letters came, though by that time, N.R.A. had long since granted the druggists their own loss limitation provision and the conditions surrounding the approval of the original code were a dead issue******

(*) Letter of 10/24/33; folder marked "157-Retail -A-L"; Deputy's files

(**) Telegram from C.W. Smith of N.R.A. to John Dargavel, secretary of the association, 10/24/33; Deputy's files

(***) Telegram from Dargavel to C.W. Smith, 10/25/33; Deputy's files.

(****) Letter from John Dargavel to C.W. Smith of NRA. January 15, 1934; Deputy's files.

(*****) Copy is in folder marked "Protests"; Deputy's files

(******) Copies of these letters are in the folder marked "General Correspondence"; Deputy's file.

The objections of the small druggists to the approved loss limitation provision centered around its low degree of price protection. In principle, it pegged prices at the merchandise cost of the dealer with the largest buying power in each trade area. In the drug trade, since the large dealer's cost was 15% or more below that of the small dealer, the latter took a considerable loss when meeting the prices of the former. The provision purported to eliminate loss leader selling but it did so only in the narrowest sense, by preventing the large price cutter from selling below his own invoice cost.

Some hope for relief lay in the promise of a labor mark-up. Small druggists realized, however, that the addition of a percentage covering perhaps part of the price-cutter's labor costs, might still not raise the code price to the cost of the goods to the small man, and in any event would not give him a sufficient return on his own labor costs. As the drug code authorities attempted to administer the loss limitation provision, they discovered another defect in it. The clause was unenforceable. There was no fixed, definite minimum price on each product, but the code price fluctuated from trade area to trade area and from day to day according to the success of individual price cutters in obtaining goods at a low cost. Even had the price-cutters' merchandise costs been readily ascertainable, the constant fluctuation of the code price would have caused administrative difficulty; but to add to the problem, the merchandise cost of a given store was a matter usually known only to that store, and divulged reluctantly if at all. A code authority suspecting a given price of being below the code minimum had no means of checking except by examining the store's invoices. If the store refused to disclose these documents, there was nothing to compel them to do so.

VI. Efforts for a New Loss Limitation Provision; Attitude of NRA

From their initial dissatisfaction with the approved loss limitation provision, drug association leaders turned to a search for ways to improve it. At first they felt that NRA could, if it would, erect a satisfactory structure upon the approved provision by revising the definition of "cost" and adding a substantial labor mark-up. Therefore, in November, 1933, the National Retail Drug Code Authority presented NRA two briefs*. One of these urged that NRA withdraw with respect to drug products, its statement that "cost" meant individual invoice or replacement cost, and issue instead an interpretation that "cost" meant the manufacturer's wholesale list price per dozen on products possessing such a price, and on other products the "normal wholesale price actually prevailing in the immediate market". The second brief urged the approval of a 15% labor mark-up stating that the normal wage cost of a drug store, exclusive of a proprietor's salary, was 18%; but that 15% would be satisfactory.

(*) Both dated 11/15/33; "Mr Whiteside's folder"; Deputy's file

The early attitude of NRA toward these proposals appears from two documents. One of them, a pencilled memorandum, on a printed form headed "From the Desk of Hugh S. Johnson", was attached to the second brief mentioned above, and states, "Whiteside; This* is too much, but we must act at once on the differential - H.J." The second document was a memorandum from Deputy Whiteside to General Johnson**, returned to Whiteside with Johnson's pencilled comments in the margin. The memorandum stated that the National Retail Drug Code Authority had asked for a 15% mark-up. General Johnson's comment: "No".
The memorandum stated that Whiteside had suggested to the druggist that they start with a small mark-up and work up if necessary. [illegible] General Johnson; "I agree". The memorandum further stated that the druggists definition of cost seemed absolutely incorrect.

While the Code Authority was busy in Washington working for a new definition of "cost" druggists in the field were active. A mass meeting in Kansas City forwarded a resolutions to NRA asking for the old "21% clause"; the establishment of the manufacturer's wholesale list price per dozen as "cost"; a mark-up equal to the labor cost of the average druggist; the right to make resale price contracts with manufacturers; a prohibition upon premiums, and permission to manufacturers to put serial numbers on their goods.*** Druggists in New York City also held a mass meeting with an attendance of 2,000 and forwarded resolutions to NRA asking much the same things as the Kansas City meeting.**** The 12th District local code authority in Texas forwarded returns from a questionnaire submitted to 172 drug stores in Fort Worth and vicinity. Of 147 replies, 119 voted for a 50% mark-up and a re-definition of cost as the manufacturer's wholesale list price per dozen; 23 voted for the same re-definition of cost, but with a 35% mark-up; 4 did not vote, and one***** voted against any form of price control.****** One cosmetic manufacturer openly joined the fight, sending NRA a copy of his printed circular to retailers assuring them of his backing in their efforts for increased price protection.******* The number of letters and telegrams from independent druggists during the early stages, however, was small. Not until February, 1934, when NRA had agreed to consider an amendment to the loss limitation provision was the mass pressure unleashed.

(*) The figure 15% was encircled in pencil on the brief to which this was attached

(**) Dated November 18, 1933 "Mr Whiteside's Folder", Deputy's files

(***) Resolutions dated about November 30, 1933; Deputy's files. The right of manufacturers to put serial numbers on their goods to effectuate the policing of refusal-to-sell policies had previously been denied by the courts in the Beechnut case.

(****) Resolutions dated November 10, 1933; Deputy's files

(*****) Leonard Bros. department store, an establishment consistently opposed to price maintenance, and especially active in opposing the loss limitation provision of the Retail Food and Grocery Code.

(******) Copies of the questionnaires with letter of transmittal dated December 11, 1933 are in folder marked "157 Retail-Code Documents"; Deputy's files.

(*******) See letter from Carl Weeks, Armand Company November, 1933; Deputy's files

The effort for a re-definition of cost under the existing loss limitation provision gradually changed into an effort to amend the code so as to give the drug trade an entirely new provision of its own. Possibly the reason for this change of tactics was that the general retail trade seemed satisfied with the invoice cost type of code price, and so long as this trade and the drug trade used the same provision, it could not be interpreted as the druggists wished.

The first suggestion for a new clause appearing in the records examined was that no one should sell drug products below the "lowest price published or openly quoted.....in dozen lots by any wholesaler to retailers in the particular trading area, free goods and other premiums and gifts to be considered pro rata in arriving at such price....." Deputy Whiteside in a memorandum to General Johnson recommended approval of this proposal for a 90-day trial period, urging that the small druggist should be helped quickly to overcome the buying advantages of large stores.* General Johnson evidently changed his former attitude and NRA published the proposed clause in a Notice of Opportunity to File Objections. ** Inasmuch as the clause was proposed as an amendment to the code, it was irregular to handle it on a mere notice instead of by public hearing, and this irregularity resulted in criticism from the price-cutting interests. The files do not contain any correspondence objecting to the purposed clause but it is known that a number of price-cutters did object.*** The files do not contain, however, a document probably representative of the price-cutters' attitude. This is a press release from the office of the Washington attorney for the Katz Drug Company of Kansas City, stating that the proposed amendment would greatly increase prices in large drug stores, department stores and chains, and that the Katz Drug Company would attack it in court if it were approved. The release criticized Deputy Whiteside as the "number 1 price fixer" of NRA and stated that the amendment would prevent the consumer from obtaining any saving from Katz' car-loading buying. It ended by objecting to the lack of a hearing, saying that the public would not know how many persons had objected and that the provision was invented in secrecy and could not stand the full light of day,****

The small druggists responded rather strongly to the Notice of Opportunity to File Objections. On February 28, 1934, NRA received 349 telegrams asking prompt action on a code price based on the

(*) Memorandum dated 2/1/34; "157 Retail - Code Documents"; Deputy's files

(**) Notice of Opportunity to File Objections, Administrative Order 60-18, 2/20/34; Code Record Section files,

(***) At the public hearing of June 7, 1934 (discussed hereinafter), several of the price-cutters specifically mentioned having filed objections in response to the Notice, See transcript of hearing.

(****) A carbon copy of the press release is in the folder marked "Memoranda"; Deputy's files, Katz' Washington attorney informed the author during the course of this study that several newspapers had published the release.

manufacturer's wholesale list price per dozen plus a 10% labor mark-up.* The telegrams came from 29 regional drug associations, 70-odd individuals in the mid-west, and the balance scattered over the rest of the country.**

Soon after the NRA had issued The Notice of Opportunity to File Objections, the Code Authority became convinced that the proposed clause would not work. The "lowest price published or openly quoted.....by any wholesaler" would have fluctuated from day to day, and there would have been a possibility that wholesalers friendly to cut-price retailers would have quoted unusually low dozen-lot prices without the intent or ability to supply all retailers in the area at such figures. Unending legal squabbles over the meaning of the provision might have followed.

The Code Authority tentatively suggested a substitute based on the "prevailing wholesale price" in each area. This too had the objection of being difficult of determination, subject to fluctuation, and productive, of a different code price in each trading area. Finally, in March, 1934, NRA agreed to consider something akin to what the druggists had always wanted - a loss limitation provision based upon a uniform ascertainable price, practically equal to the cost of goods to small druggists.

(*) Inasmuch as the proposal under consideration had nothing to do with the manufacturer's wholesale list price per dozen and contained no provision for a mark-up, it is difficult to view these telegrams except as objections coupled with a substitute suggestion.

(**) For the summary of this correspondence, see memorandum from C. Sterry Long to A.D. Whiteside, March 1, 1934; "157-Retail - Memorandum"; Deputy's files.

VII. The March Amendment to the Loss Limitation Provision, and Its Interpretation

On March 5, 1934, Deputy Administrator Harwood wrote Division Administrator Whiteside recommending an amendment to prohibit druggists from selling below the manufacturer's wholesale list price per dozen. Mr. Harwood mentioned the question of a 10% labor mark-up, but suggested that this be postponed so that prices to the consumer would not rise too fast.* The record does not show why Mr. Harwood's recommendation was changed in the approved draft of the amendment, but doubtless it was because some officials foresaw the result of handing too much power to manufacturers. Although the manufacturer's wholesale list price per dozen had for years been a stable price, fairly close to the small druggust's merchandise cost, there was a chance that its establishment as a code price would induce manufacturers to manipulate their price policies so as to insure a margin to the small druggist selling at the code price. Such manipulation would have violated the principle of the provision that the minimum price should be the cost of the goods to the small druggist, and to prevent such a violation, NRA at the last minute threw into the clause a proviso requiring the deduction from the manufacturer's wholesale list price per dozen of discounts, free deals, and rebates available to all purchasers of dozen lots.**

The Amendment was approved on March 29, 1934, without a prior public hearing and without further Notice to File Objections (though it differed substantially from the clause previously published). The approval was contrary to the recommendations of the Consumers' Advisory Board, Research and Planning Division, Industrial Advisory Board, and Labor Advisory Board. The Assistant Deputy Administrator, in transmitting the proposed amendment to General Johnson, wrote that it would eliminate loss leader selling and probably reduce prices to the consumer over a wide range of products, thus more than counteracting its tendency to raise prices on the few loss leader items. The Assistant Deputy took issue with the advisory boards on the definition of "Efficiency", saying that mere heavy buying power and loss leader selling were not efficiency but "chiseling practice", and that the price cutters rendered little public health service. General Johnson, in his letter to the President explaining why he had approved the amendment, stated that the previous loss limitation provision had proven unenforceable in the drug trade, and the amendment, while not altering the basic principle of the former provision, made it enforceable.

As approved the amendment read as follows:

"Inasmuch as the vast preponderance of drug store products are distributed through small drug retailers who are unable to

---

(*) This memorandum is in folder marked "157 Retail - Memoranda"; Deputy's files

(**) Chapter VI of this part shows how the possibility of price manipulation by manufacturers became an actuality when, in the September amendment, this safeguarding proviso was removed. See page 107 et. seq.

[illegible] basis but who perform services which are essential to the welfare of those in their communities, and whereas such services cannot adequately be performed through the facilities provided by their competitors, and whereas in some cases sales are made to consumers by such competitors at prices below the lowest cost of purchase normally obtainable for such merchandise by small drug retailers, and whereas in most instances such sales prices are not a true indication of the general level of prices of such competitors and no general benefit to those in the community accompanies the same, but such prices are in fact in the nature of bait offers of merchandise to attract trade, it is hereby declared an unfair trade practice and is prohibited by this code for any drug retailer to sell any drugs, medicines, cosmetics, toilet preparations or drug sundries at a price below the manufacturer's wholesale list price per dozen, provided, however, that in the case of biologicals or other of the above-mentioned products which are not customarily sold in dozen or greater lots the Code Authority may fix a comparable unit quantity, and provided further that any discount, free deal, or rebate which is made available to all purchasers of dozen lots or comparable quantities, shall be considered as part of the manufacturer's wholesale list price."

From the facts alleged in the preamble, the avowed purpose of this amendment was to peg minimum prices at, but no higher than, the small dealer's merchandise cost. The use of the manufacturer's wholesale list price per dozen to accomplish this purpose involved the presumption that the small dealer regularly purchased in dozen lots or smaller quantities. Trade association representatives had frequently assured NRA that this was so. However, the dozen-lot cost of drug products in some instances was less than the manufacturer's wholesale list price per dozen by the amount of dozen lot discounts or free goods offered by the manufacturer or the wholesaler or both. The amendment(*) in its "last proviso"(**) required the deduction of certain discounts in the determination of the code price; and a question immediately arose as to what discounts it meant to cover.

To answer this question required several conferences among NRA officials and a formal interpretation. One faction at the conferences argued that the "last proviso" should cover both manufacturer's and wholesaler's discounts, otherwise, the code price would not precisely equal the dozen-lot cost of the small dealer. The other faction argued that such exact equality between code price and small dealer's cost was unnecessary; that wholesalers' discounts were negligible in amount, and that to include them would produce a different price in each trade area and seriously hamper enforcement of the code. General Johnson decided in favor of the latter view, and on April 6, 1934, NRA issued an interpretation that the "last proviso" referred only to

---

(*) Hereafter in this report, the amendment now under discussion will be referred to as either the "March amendment" or the "March provision".

(**) Hereafter in this report the proviso in the March amendment concerning the deduction of dozen-lot discounts and deals will be referred to as the "last proviso".

manufacturer's price concession. The interpretation, containing also certain other explanations of the amendment, read in substance, as follows:(*)

1. The amendment does not apply to all items sold in drug stores, but only to drugs, medicines, cosmetics, toilet preperations and drug sundries as defined in the code. Drug sundries being doubtful of meaning are interpreted as "articles or appliances used in the promotion of public health and sanitation".

2. Certain commodities with no manufacturer's wholesale list price per dozen, such as unbranded products, and goods put up under the retailer's own brand (private brand goods), are not subject to the amendment and the retailer may sell them at any price he pleases.

3. The "comparable units" section of the amendment means the lowest number of the article quoted or listed and made available to all members of the trade, but never more than one dozen.

4. The code minimum price set forth in the amendment applies regardless of what the retailer has paid for the goods.

5. Free deals are to be considered in computing the code minimum price only during the time that they are offered by the manufacturer.

6. The old retail trade loss limitation provision (Article VIII, Section 1) no longer applies to drugs, medicines, cosmetics, toilet preparations and drug sundries.

7. The only discounts, free deals or rebates to be considered in computing the code price are those offered by manufacturers; and, furthermore, they must be offered either to the entire retail drug trade, or to all druggists in an area where the manufacturer is conducting a sectional promotion.

The net result of the March amendment plus the above interpretation was the fixing of a uniform and fairly stable code price, not dependent upon such violently fluctuating and unascertainable factors as individual invoice cost, but nevertheless approximately equal to the small druggist's merchandise cost. As stated previously, the only factor preventing exact equality between the code price and the small man's cost was the wholesalers' dozen-lot discounts. Inasmuch as NRA had not made any study of the economic desirability of placing the minimum price at the small dealer's cost, slight deviations from a mathematical application of the principle should have caused no concern.

(*) The interpretation appeared as Administrative Order 60-27 and is in Code Record Section files. The account here given is a summary and not the actual wording of the provisions.

The wholesaler himself rarely received more than 15% plus 3% from the manufacturer, consequently, his discount to the retailer was limited. Furthermore, preservation of his own business required the wholesaler to restrict his large discounts to a few fast-selling items. Mutual and cooperative wholesalers, by their very nature, gave discounts or patronage dividends to their members on all items, but these firms handled, usually, an incomplete line of merchandise.

CHAPTER IV. HISTORICAL DEVELOPMENT OF THE LOSS LIMITATION PROVISION FROM THE MARCH AMENDMENT TO THE EXPIRATION OF CODES

I. Administrative Problem Raised by "Last Proviso" of March Amendment

Though the March amendment produced a uniform and fairly stable code price much more satisfactory to the small druggists than the previous loss limitation provision, it had one great weakness in its "last proviso".

Every druggist knew or could quickly ascertain the manufacturer's wholesale list price per dozen on a given drug or cosmetic product by consulting the Druggists Circular Red Book Price List* or the American Druggist Price Book.** The editor of the latter publication estimated in 1934 that more than 40,000 druggists had copies*** and this circulation added to that of the Red Book probably included every druggist in the country. However, the use of ascertaining the manufacturer's wholesale list price per dozen did not help the druggists in determining the code price, for the latter depended upon the deduction from the former of all manufacturers' current dozen-lot free deals and discounts.

No source of information existed to inform druggists of the current deals of all manufacturers except perhaps the wholesaler, and even he was often confused and unable to keep track of the constant fluctuations on the 40,000 items he stocked. A few manufacturers offered fixed dozen-lot deals as part of their permanent price policies**** and these were easy to handle but the vast majority ran their deals seasonally and not in accordance with any definite plan. The traditional mode of thinking of the small druggists increased their difficulty in ascertaining the code price. To them the unadulterated manufacturer's wholesale list price per dozen was their invoice cost, and any free goods or discounts were mere pleasant gratuities. Because the code price included these deals and discounts, the small druggist was confused by it, and sought information from his wholesaler. But NRA could not expect wholesalers to assume the onerous of acting as price information bureaus nor place the burden on the retailer to check by telephone all doubtful prices. To add to the problem some of the larger retailers and department stores objected that -- con't.

(*) Published by the Druggists Circular, New York City and revised in May and November each year. Hereinafter referred to as the "Red Book".

(**) Published by the American Druggist, New York City and revised annually. In addition, when new products or changed their prices were published in the American Druggist, a monthly magazine of the same publishing house. Hereinafter referred to as the "Blue Book".

(***) Letter from Harold T. Hutchins, editor to Assistant Deputy Administrator Lark Morrell, 8/17/34; folder marked "Prices" Deputy's File.

(****) For example, the Armand Company, Des Moines, Iowa has for years given three extra packages free with the purchase of a dozen.

since they never bought in dozen lots and had little contact with wholesalers, they had no source of information on the code price.* A method of circulating accurate and current code price information to the trade had to be devised.

(*) The Washington attorney for R. H. Macy & Company, New York City made frequent verbal representations to NRA on this point after the approval of the March amendment.

II. Order 60-54 and the Minimum Price Lists

On April 19, 1934 NRA issued Administrative Order 60-54 (*) requiring the National Retail Drug Code Authority to issue a list of minimum code prices and permitting local retail drug code authorities to do likewise if they wished. The list was to be prima facie evidence of the correct price so that anyone who violated it had the burden of proving the list wrong. On unlisted items, any retailer could cut his price to meet that of a competitor provided he notified his local code authority. This last-named part of the order meant virtually that the loss limitation provision covered only such products as the code authority could assemble in a list and this is an important point in view of the small number of items in the lists actually issued.

During April, the National Retail Drug Code Authority compiled a list of about 800 items, obtaining their price information directly from manufacturers. The task proved difficult and when the list finally appeared it contained many errors and soon became wholly obsolete because of changes in manufacturers' discounts. The National Code Authority issued a second list in May, covering about 1,000 items. (**) Experience gained with the first list made for greater initial accuracy in the second, but it too gradually became obsolete. The expense of making and distributing the two lists was so great, that the National Code Authority never issued another, but bent its efforts toward persuading NRA to eliminate the "last proviso" from the March amendment so that the flat manufacturer's wholesale list price per dozen would become the code price.

Some of the larger local code authorities had also issued price lists under Order 60-54, and a few of them tried to keep their lists up to date as late as the summer of 1934. However, most of them were even less able to stand the expense than the National Code Authority. Abandonment of the task of issuing price lists brought the full burden of acting as price information bureaus on the local code authorities. Their attitude toward this burden is indicated by a letter from one of them(***) stating that unless manufacturers' dozen-lot deals were prohibited or else eliminated from the computation of the code price, the work of the local code authority would degenerate into a "constant scrutiny of price lists and the issuance of puerile price changes.....of interest only to cut-raters". The writer added that the small druggist was paying code assessments to keep the cut-raters informed as to the keenness of the w[illegible]on used to cut the small man's throat.

(*) Copies are in Code Record Section files. Hereinafter, this order will be called by its number - 60-54.

(**) Both lists are in "Prices" folder; Deputy's files.

(***) Letter to NRA from Northern California Retail Druggists Association, July 23, 1934; "trade practices" folder; Deputy's files.

III. Proposed Solutions of the Problem

The Code Authority's proposed solution of the problem was to eliminate the "last proviso" from the March amendment and make the flat manufacturer's wholesale list price the code minimum. N.R.A., however, was not willing to assent to this proposition without erecting some safeguard for the consumer. Though N.R.A. had not seriously investigated the economic implications of retail price control, it had established firmly in its own thinking a principle for the retail drug code. This principle was that any fixing of prices at a level higher than the small dealer's merchandise cost was uneconomic. The principle became established somewhat subconsciously, more as a compromise among diverse interests than as a result of economic analysis. Among these interests were: the trade, wanting all the price protection it could secure; the Consumers' Advisory Board, convinced that any form of price fixing would raise consumer prices and perpetuate inefficient distribution units; and the Legal Division, afraid that courts would invalidate code price provisions as they had done private price-fixing. Probably the development of the small dealer's cost theory was a natural evolution from the earlier principle that loss leader selling was an evil, for loss leader selling involved selling below cost. The first loss limitation provision prohibited sales below the large dealer's invoice cost, but proved no protection to the small man; so, the small man's merchandise cost became the point, in N.R.A.'s mind, at which loss leader selling began.* The resistance of opposing interests was too strong to permit adding a mark-up to cover the small man's overhead expense; hence the compromise was struck at the small dealer's merchandise cost, and there it remained.** When the Code Authority proposed the elimination of the "last proviso" from the March amendment, N.R.A. foresaw that manufacturers might, by giving substantial discounts and free goods to small dealers, make their manufacturer's wholesale list prices per dozen fictitious and considerably higher than the small dealer's cost.*** The possibility was not merely theoretical, for there were compelling reasons why manufacturers would want to manipulate their prices. One doing so would incur much good will among the small druggists who would thereby receive a gross profit when selling at the code price. At the public hearing on June 7, 1934**** the Code Authority

---

(*) Compare N.R.A.'s principle that price fixing must not rise above the small dealer's merchandise cost, with the principle behind the State Fair Trade Laws permitting manufacturers to set their minimum prices at any point they please. Part III of this report. Page 174

(**) See infra for discussion of ineffectual attempts of the trade to obtain a mark-up.

(***) There was a loophole even under the "last proviso" enabling manufacturers to accomplish this result by offering discounts or free goods on lots of 13 units instead of a dozen because the "last proviso" applied only to dozen-lot deals. However, no instances of this subterfuge ever came to N.R.A.'s notice.

(****) Discussed infra in this Section; paragraph E

proposed an amendment to replace the March amendment, eliminating the "last proviso" and setting up a safeguard against price manipulation by manufacturers. The safeguard empowered N.R.A. to order the deduction of dozen-lot deals on any product where these deals made the manufacturer's wholesale list price unreasonably greater than the small dealer's cost.* N.R.A. gave little consideration to this proposal at the time though of all the subsequently-considered plans it was most nearly like the one finally approved.

After the hearing, administrative officials felt that they could best answer the objections of the Consumers' Advisory Board and Research and Planning Division by establishing a price control committee, composed of representatives of these two bodies and of the Code Authority, to investigate manufacturers' price manipulations. The committee's functions were to be advisory, and the Administrator was to have power to suspend the loss limitation provision as to an offending product and establish in its stead such other regulations as he deemed advisable.** Both the Consumers' Board and the Research and Planning Division objected to the plan. The Consumers' Board wrote that the Committee would have an impossible task; and the Research and Planning Division feared that the scheme would involve N.R.A. in permanent price control. Both seemed to dislike the name "Price Control Committee."*** Inasmuch as the principal advantage expected from this plan was the support of these two advisory boards, the sponsors turned to something else. The next suggestion was that N.R.A. leave the March amendment and its "last proviso" intact, and issue new regulations for its administration in place of Order 60-54. Under the proposed new regulations, the National Retail Drug Code Authority would have recommended certain commercial price lists as guides to the code price.**** Inasmuch as the prices in these lists were higher than the code price by the amount of manufacturers' dozen-lot deals, local code authorities would have had power to determine for each product, as the question arose, the amount of deduction under the "last proviso." From a practical viewpoint, this was little better than Order 60-54. The burden on the local code authorities to distribute price information would have been greater than before, though the National Code Authority would have been freed of this task. From a legal viewpoint, the proposed regulations were bad, and received prompt objection from the Legal Division on the ground that they were confusing, unnecessary and ineffective and gave too much power to the local code authorities. The legal division also objected to the Government placing any measure of

---

(*) See testimony of John Goode, page 388 transcript of hearing, June 7 and 8, 1934.

(**) A copy of this plan is in "memoranda" folder; Deputy's file.

(***) See Consumer Board Report to Mark Merrell, 7/20/34; and Research and Planning Report of 6/23/34; "memoranda" folder, Deputy's files.

(****) The Code Authority's intent was to recommend the Red Book and Blue Book, mentioned supra.

approval on commercially-published price lists. At this time, the Legal Division reviewed Order 60-54 and found it defective in that it permitted, for the purpose of meeting competition, violations of the code price on items not in the Code Authority's list. Only by code amendment and not by mere administrative order could N.R.A. so substantially change the operation of a code provision. The Legal Division observed that if the March amendment was so indefinite that a retailer could not readily determine the code price, the whole provision might fail in court.* This report of the Legal Division made it imperative that N.R.A. not only rescind Order 60-54 but also eliminate the "last proviso" from the March amendment. But the question of how to prevent price manipulations by manufacturers was still unsolved.

IV. The Amendment of September 21, 1934.

The final proposal of the Code Authority and the administrative officials of N.R.A. was an amendment eliminating the "last proviso" and empowering the Administrator to suspend or modify the operation of the loss limitation provision wherever he found a manufacturer manipulating his prices in a manner prejudicial to the consumer or small enterpriser. This plan was simple compared to former ones and all advisory boards, except the Consumers' Board, approved it on the ground that it did not change the principle of the March amendment but merely made it more effective. Regardless of objections to the provision, so long as it remained in the Code it was N.R.A.'s duty to make it workable, and upon this ground, boards that had objected to the March amendment were consistently able to approve the new one. The Consumers' Advisory Board did not voice a strong disapproval but merely reiterated its stand against the principle of setting minimum prices at the manufacturer's wholesale list price per dozen.** The Administrator approved this proposal as an amendment to the code on September 21, 1934, stating in his letter to the President, *** ".....at a public hearing called to determine the effects of this amendment (the March amendment) upon the trade after sixty days of operation, it was found that enforcement of this provision, while good, had been hampered somewhat by the last proviso which permitted certain deductions on account of manufacturers' discounts and allowances to dozen-lot purchasers. These allowances have only a negligible effect on the resultant price, yet cause considerable confusion in its determination. ".....

"This amendment (the September amendment) does not alter the principle set forth in the previous provision nor does it appreciably alter the basis on which that principle was applied, except insofar as that

---

(*) The Report of Legal Adviser Hays to R.L. Houston, September 10, 1934 - Deputy's files.

(**) For all Board reports, see docket on Amendment No. 6, Code Record Section files.

(***) Letter is included in printed issue of Amendment No. 6, Retail Trade Code.

basis had proven confusing in practice."

The September amendment, as approved, reads as follows:-*

"It is hereby declared an unfair trade practice** for any drug retailer to sell any drugs, medicines, cosmetics, toilet preparations or drug sundries at a price below the manufacturers' wholesale list price per dozen; provided, however, that in the case of biologicals or other of the above-mentioned products, which are not customarily sold in dozen or greater lots, the Code Authority may fix a comparable unit quantity.

"The Administrator, at the recommendation of the National Retail Drug Code Authority or otherwise, after such notice and hearing as he may deem necessary, may suspend or modify the operation of this clause at any time when it appears that such operation does not tend to effectuate the purpose of Title I of the Act. The Administrator shall suspend or modify the operation of this clause in any particular case where a manufacturer is found to be manipulating his prices because of this provision in such a manner as to maintain an unwarrantedly higher price to the ultimate consumer or to oppress small enterprises, or to otherwise defeat the purposes of the Act."

In the above form, the loss limitation provision remained until the expiration of the code on May 28, 1935. Inasmuch as Order 60-54 was no longer necessary, N.R.A. rescinded it on September 25, 1934.***

V. The Public Hearing of June 7 and 8, 1934.

Having examined, historically, the factors directly leading to the approval of the September amendment, it is advisable to go back and examine some of the collateral historical happenings during the period from April 1934 to the expiration of the Code. One of these incidents was the holding of a public hearing on June 7 and 8, 1934.

Immediately after the approval of the March amendment, N.R.A. reviewed its legal position and decided that amends were necessary for the failure to hold a public hearing. Several of the cut-rate representatives had objected to the procedure of issuing a mere Notice of Opportunity to File Objections, and the validity of their complaint gained strength from the substantial changes in the clause between the Notice and the final approval. Consequently, N.R.A. scheduled a

---

(*) Hereinafter, this amendment will always be referred to as the "September amendment."

(**) Note that the long preamble of the March amendment is omitted, it having no legal value. Note also that the words "and is prohibited by this code" are omitted at the point where the asterisk appears. This latter omission was purely an oversight, but caused some worry among lawyers for fear courts might regard the provision as purely advisory and not mandatory. However, no court rendered a decision on the point.

(***) See Administrative Order 60-300; Code Record Section files.

public hearing, ostensibly to determine the effects of the March amendment, after 60 days of operation, but also for the purpose of insuring that amendment's legality. The announced purpose of the hearing, however, frightened some of the code sponsors who read into it a possibility that N.R.A. might rescind their new loss limitation provision if the hearing adduced enough evidence against it. John Dargavel, secretary of the National Retail Druggists' Association, wired, asking the Deputy Administrator to sidetrack the hearing unless N.R.A. saw some actual bad effects from the loss limitation provision in 60 days.* George M. Gales, president of the National Association of Chain Drug Stores, also wrote the Deputy, deploring the uncertainty the hearing would create.** On April 11, 1934 the Deputy wrote the Assistant Administrator suggesting that it would be a mistake to hold the hearing on June 7, since not enough time would have elapsed to show the effects of the March amendment.***

In spite of these objections, the hearing convened on June 7, and lasted two days. The witnesses presented little factual material on the effects of the March amendment but much argument on whether its basic principle was sound and whether or not the druggists should revert to the "cost plus 10%" provision of the General Retail Trade. Much of the argument was identical with that introduced at the original code hearing in August, 1933. The representatives of the Code Authority gave a good part of their time to arguing for the elimination of the "last proviso" of the March amendment. The legal division considered this hearing sufficient to warrant the approval of the September amendment without further hearing, though this amendment was not up for discussion. Thus both the March and September amendments lacked the benefit of a regular hearing called specifically to consider them prior to their approval.

VI. The Movement for a Mark-up.

As mentioned before,**** prior to the approval of the March amendment, the question of a mark-up arose. The Deputy Administrator in recommending a code price based on the manufacturer's wholesale list price per dozen, suggested postponing the approval of a percentage mark-up so that consumer prices would not rise too fast. The Code Authority realized that a code price at the level of the small dealer's merchandise cost would not permit small dealers to pay their overhead in areas of severe price competition. However, N.R.A. was afraid to

---

(*) Telegram Dargavel to Harwood, April 10, 1934; "157-Retail M-Z"; Deputy's files.

(**) Letter Gales to Harwood, April 13, 1934; "157-Retail-A-L" Deputy's files.

(***) Memorandum Harwood to Colonel Lea, April 11, 1934; "157-Retail-M-Z; Deputy's files.

(****) Chapter III. of this Part, supra, page 114

grant too much price protection all at once and the Code Authority, glad to receive even part of what it asked for, did not press the point too strongly.

On April 13, 1934, George H. Gales, Code Authority member and president of the National Association of Chain Drug Stores, wrote the Deputy Administrator asking if it were then advisable to request a mark-up covering labor costs.* The Deputy replied that such a request might be all right in 60 days.** This correspondence was perhaps the beginning of a long fight, and in this, for once, the individual small druggists in the field were more active than their Code Authority. As opposition developed within and without N.R.A. to the manufacturer's wholesale list price as a code price, the Deputy's Office affixed itself to the principle that price protection in the drug trade must not exceed the small dealer's merchandise cost. The Code Authority members had achieved this limit in the March amendment and confirmed it in the September amendment and could have no more. This they realized, and, since their minds were occupied with other major problems such as the "last proviso" and, later, compliance, they made no formal demands for a labor-markup. However, they did frequently mention it informally and the National Association of Retail Druggists at its convention in 1934 went on record in favor of a mark-up.***

Letters to N.R.A. from small druggists were plentiful during the code period and most of them expressed dissatisfaction explainable only by the fact that the loss limitation provision contained no mark-up above their merchandise cost. Fifty-seven letters specifically asked for mark-ups ranging from 5% to 25% according to the writer's notion of what he needed; and in one congressional district, the local pharmaceutical association passed a resolution urging all druggists to violate the code until N.R.A. granted their request. The number of letters on this subject did not run into the hundreds as did letters received by N.R.A. in 1933 but perhaps they were more significant since they came in a continual flow rather than in batches and not, so far as appears as a result of any trade association pressure.****

VII. Interpretation of the September Amendment

Chapter III. of this Part describes an interpretation of the March amendment. When N.R.A. approved the September amendment, this interpretation needed revision, and though work on it commenced promptly it was not completed until April 1935. The cause of the delay was an attempt of the administrative officials to include a series of clauses on the effect of Federal and State taxes on the code price. These

---

(*) Gales to Harwood, 2/13/34; "157-Retail-A-L"; Deputy's files.

(**) Harwood to Gales, 4/14/34; "157-Retail-A-L"; Deputy's files.

(***) See Resolution, "Code Authority" folder; Deputy's file.

(****) All of the letters mentioned above are in the folders marked "General Correspondence" or "Trade Practices"; Deputy's files.

clauses required many conference with the Legal Division before they were in shape, and considerable time thereafter in an unsuccessful attempt to convince the Review Division* of their propriety. Finally the Deputy Administrator abandoned the tax interpretations** and sent the remainder, a group of explanations, on their way toward approval. As approved on April 5, 1935, they read as follows:-***

QUESTION #1: Does the interpretation issued by the Division Administrator on April 6, 1934 and released to the public on April 7, 1934 apply to this loss limitation provision?

INTERPRETATION: It does not. The interpretation of April 6, 1934 applies to the former loss limitation provision which has been amended. That interpretation should henceforth be disregarded.

QUESTION #2: Does this loss limitation provision apply to all items sold by drug retailers?

INTERPRETATION: It does not. It applies only to drugs, medicines, cosmetics, toilet preparations, and drug sundries. These are defined in the Code.

QUESTION #3: Does this loss limitation provision apply to drugs, medicines, cosmetics, toilet preparations and drug sundries sold by stores other than drug stores?

INTERPRETATION: It does. It does not matter who sells any of the above named items. He cannot sell them below the price determined by this loss limitation provision.

QUESTION #4: Where certain commodities are not available to the trade generally, and hence bear no manufacturer's wholesale list price per dozen or comparable unit quantity, does this loss limitation provision apply?

INTERPRETATION: It does not. Items of this type, such as, but without limitation, privately branded items put up by the producer for a special retailer under such retailer's own name, mark or brand, may be sold at any price such retailer may care to set.

QUESTION #5: Do the provisions of Article VIII, Section 1 of the

---

(*) A body of lawyers who gave all formal orders a final checking as to form and substance and whose approval was almost prerequisite to official approval of the order.

(**) Full discussion of the abandoned tax interpretations is in Chapter VI of this Part, page 122.

(***) Administrative Order No. 60-387; Code Record Section files.

Code of Fair Competition for the Retail Trade apply to the retail sale of drugs, medicines, cosmetics, toilet preparations and drug sundries?

INTERPRETATION: No, Article VIII, Section 1 has been superseded by this loss limitation provision as far as the sale of the above-mentioned items is concerned.

QUESTION #6 If a retailer is able to purchase at less than the manufacturers' wholesale list price per dozen, or if he is able to obtain goods absolutely free, can he sell below the manufacturers' wholesale list price per dozen?

INTERPRETATION: He cannot sell drugs, medicines, cosmetics, toilet preparations, or drug sundries below the manufacturers' wholesale list price per dozen regardless of what he has paid for the goods, and regardless of whether he has gotten them free.

QUESTION #7: When the price for a unit or combination of units under this loss limitation provision figures out with a fractional cent, what price shall prevail?

INTERPRETATION: The minimum selling price shall be figured by dropping the fraction and adding one cent, regardless of whether the fraction is more or less than one-half cent.

Where the minimum selling price of a combination of these items is to be determined, fractions shall be left intact until the total price of the combination has been determined, and then, if a fraction remains, it should be dropped and one cent added.

CHAPTER V. ISSUES SEEN BY OPPOSING FORCES

I FOREWORD

During the preliminary negotiations for a code in the Fall of 1933, and the subsequent negotiations in 1934, the proponents and opponents of price stabilization arrived at certain conceptions of what economic and factual issues might control NRA's decision upon their respective demands. Some arrived at these issues through a bona fide analysis of social and economic considerations; others arrived at them through emotional hunches.

NRA held two important hearings on the retail drug code, and, at these forums both proponents and opponents had their greatest opportunity to present their views. The following compilation of issues seen by proponents and opponents has its source principally in the transcripts of hearings, since records of informal conversations are scarce. In each case, the issue appears as a broad principle with an analysis of why it seemed an issue to those advancing it, and is followed by a brief digest of the evidence and arguments advanced.

In presenting the issues hereinbelow, the author has tried to arrange them in an orderly fashion, separating the proponents' issues from those of the opponents, and re-arranging the points on each side to form a logical whole. Actually, at the hearings, the presentation was quite disorganized. Without reference to their views, speakers were mixed upon the program, and many had no orderly arrangement of points within their own briefs. Moreover some speakers were given to emotional appeals and sweeping assertions, unsupported by evidence and difficult to classify.

II. Issues Seen by the Proponents of Price Stabilization

The issues seen by the proponents of price stabilization were divisable into two parts: first, issues upon price stabilization as a broad principle without reference to specific clauses, and second, price stabilization through the medium of the manufacturer's wholesale list price per dozen. The testimony at the hearing in August 1933 was devoted principally to the first point; the testimony at the hearing in June 1934 to the second.

A. Issues Upon Price Stabilization in General

1. Bad Business Conditions in the Trade.

Knowing that NRA's principal objective was the promotion of recovery from the depression the proponents dwelt at length upon the bad business conditions in the retail drug trade. To show that sales volume was declining, one witness presented returns from questionnaires sent to 6,500 drug stores in New York State in 1930, 1931 and 1932, showing that sales volume of the stores reporting had declined 13.95% in 1930 (presumably over the previous year), 16.4% in 1931 and 22% in 1932. (*)

(*) The witness was Leon Monell, Chairman, Committee on Pharmaceutical Economics, New York State Phar. Assn., a group affiliated with NARD and APhA. His testimony appears on Pages 306 to 311, transcript of Aug. 25-26, 1933. Mr. Monell's association had conducted the questionnaire survey mentioned, and their returns had been: 596 stores in 1930, 404 in 1931, and 406 in 1932.

The witness also stated that a survey by the University of Buffalo of 40 selected drug stores in Buffalo showed a sales decline of 30% in 1932. The witness added that the majority of stores in New York State had had a steady sales decline since January 1, 1933. This same witness testified that drug store rent was still high in spite of the depression, and in spite of declining sales. He quoted again from his questionnaire survey to show that rent expense was 7.1% of sales in New York State in 1931, and 8.4% in 1932.

Two witnesses stated that drug stores were operating without a profit. One of them (*) made the statement without amplification, but the other (**) backed it with returns from a questionnaire survey in West Virginia showing that 54% of the stores reporting had a net loss in 1932, and that in over half of these instances the loss was more than 2½% of sales. Dollar losses ranged from $300 to $4,000 with the majority over $1,000. Only 46% of the stores reporting had a net gain in 1932, and of these 62% had a net gain of less than 5% of sales. Dollar gains ranged from $300 to $3,000, but the majority were under $1,000. (***)

Five witness sought to show that the credit of the small druggist was strained or totally lost, so that he was forced to buy for cash on a hand-to-mouth basis. One of these witnesses (****) stated that 3,000 (*****) small drug stores in California had lost their reserves and had strained their credit.

Another (******) estimated that 40% of the druggists of the entire country were on a C.O.D. basis. The third witness (*******) stated that 90% of the drug stores in Alabama had been able to obtain credit from wholesalers in 1928, but that this figure had declined to 50% in 1933; and that the corresponding decline for the city of Birmingham was from 95% to 25% of the stores.

(*) George H. Gales, president of the Liggett Drug Company, pages 157 to 164, transcript of August 25-26, 1933.

(**) J. L. Hayman, sec., W.Va. Pharm. Assn. and pres., Conference of Pharmaceutical Secretaries. The former association was affiliated with both NARD and APhA; the latter was a division of APhA. His testimony appears at pages 201 to 205, transcript of August 25-26, 1933.

(***)The dates of the survey was August 19 to 24, 1933. 17% of the drug stores in W.Va. replied to the questionnaire.

(****) Roy S. Warnack, sec., Calif. Pharm. Assn. affiliated with both NARD and APhA Testimony appears at pages 183 to 197, transcript of August 25-26, 1933.

(*****) In 1935 there were only 3,030 independent drug stores in the State of California, according to the 1935 Census of American Business, Retail Distribution, Department of Commerce. This fact makes the witness' statement rather broad.

(******) Dr. R. L. Swain of the American Pharmaceutical Assn., pages 20-27, transcript of August 25-26, 1933.

(*******) N. G. Hubbard, pres., Birmingham Retail Druggists Assn., affiliated with NARD. Testimony at pages 244 to 248, transcript of Aug. 25-26, 1933.

This witness quoted McKesson-Peter-Neat Co., Louisville wholesale druggists, to the effect that this firm had 35 druggists on their C.O.D. list in 1931 and 44 in 1933; that 28% of their druggist customers had past due accounts in 1931, but 43% had them in 1933; and that 72% of their druggist customers discounted their current purchases in 1931, but only 58% did so in 1933. This witness also read a letter from Geo. H. Gould & Son, Louisville wholesale druggists, to the effect that 2% of their druggist customers were on C.O.D. in 1928-29, 15% in 1930 and 29% in 1933; and that in 1930, 76% of their druggist customers discounted their bills, but in 1933, only 55% did so. The fourth witness (*) quoted Smith, Kline and French, Philadelphia wholesale druggists, to the effect that 600 drug stores in that city were on a C.O.D. basis in 1933, and 200 of these were "cash only - no checks accepted". The fifth witness (**) said that 60% of the druggists in Kansas City, Mo., were on C.O.D. in 1933.

To further illustrate the bad business situation, one witness (***) testified that only 20% of the drug stores in Alabama and only 10% of those in Birmingham were solvent in 1933; and that there was a decline in the number od drug stores from 1928 to 1933 from 850 to 775 in Alabama, and from 228 to 180 in Birmingham. Another witness attempted to connect the subject of bankruptcies with one of the basic principles of NRA by arguing that a ruined retail dealer was a loss of buying power in his community. (***)

(*) J. B. Pilchard, sec., Pennsylvania Pharm. Assn. affiliated with NARD and APhA. Testimony on pages 321 to 326, transcript of August 25-26, 1933. Note that at this hearing, Mr. Pilchard gave no testimony on his own behalf, but read into the record a letter from Louis Milner, chairman, Committee on Surveys, Philadelphia Association of Retail Druggists, affiliated with NARD. The Census of American Business, Dept. of Commerce, shows 1,303 drug stores in Philadelphia in 1933.

(**) George C. Egy, representing the Greater Kansas City Retail Druggists' Assn., affiliated with NARD. Testimony at pages 397 to 403, transcript of August 25-26, 1933.

(***) H. G. Hubbard, pages 244-248, August 1933 transcript.

(****) W. Bruce Philip, Washington counsel for NARD, president of APhA, and owner of a small drug store in Oakland, Calif. Testimony at pages 421 to 436 and 446 to 454, transcript of August 25-26, 1933.

---

2. Price Demoralization as the Cause of Bad Business Conditions

Had the proponents presented no further testimony they might have made no case for price protection. NRA could well have concluded that the druggists' plight was no worse than that of other trades in the depression, and the the cure was to raise wages and shorten working hours and wait for industry as a whole to pull out of the slump. But the proponents advanced two arguments to counteract such a conclusion, one being that the financial condition of druggists was so weak that they could not bear the burden of raising wages and shortening hours without some prices protection, (*) and the other being that price demoralization was responsible equally with the depression for the bad business situation in their trade. (**)

One witness, to illustrate the extent of price demoralization throughout the country and within cities, presented data showing pre-code prices on 15 items in a number of cities; and pre-code prices on the same items within a city. In each case there was a total lack of uniformity. The witness argued that the consumer was confused, not knowing what was the best price unless he shopped extensively. (***)

3. Incidental Bad Effects of Price Demoralization

To strengthen their point that, in their trade, price demoralization was a greater cause of evil than the depression, the proponents exhibited a number of additional effects of the former.

Six witnesses testified that price demoralization had caused a drop in employment and salaries in the trade. Five of them (****) made this statement without elaboration, but the sixth (*****) backed it with the results of a questionnaire survey conducted in New York State showing that salary expense was 14.3% of sales in 1931, and only 13.3% in 1933. According to this witness, both the number of employees and the amount of salaries had decreased.

(*) Five witnesses stressed this point. Four of them, mentioned before, spoke at the August 1933 hearing, their testimony appearing at the following pages of the transcript: R.L. Swain, pp 20-27; George M. Gales, pp 157-164; Roy S. Warrack, pp 188-197, and George C. Eggert, pp 397-403. The fifth was Roy M. Sterne, counsel for the Liggett Drug Co., speaking at pages 5 to 26 transcript of hearing of June 7-8, 1934.

(**) Only four witnesses expressly presented their point, but others included it in their testimony by inference. The four were: R. L. Swain, pages 20-27, August transcript; George M. Gales, pages 157-164, Aug. transcript; J. L. Hayman, pages 201-205, Aug. transcript, and Samuel C. Henry, sec. Nat'l Assn. of Retail Druggists, pages 211-213, Aug. transcript.

(***)Wheeler Sammons, Managing Director, Drug Institute of America, Inc., pp. 150-204 & 499-527, transcript of June 7-8, 1934.

(****) R. L. Swain, pp 20-27, Aug. transcript; Samuel C. Henry, pp 211-213, Aug. transcript; George M. Gales, pp. 157-164, Aug. transcript; Roy M. Sterne, pp. 5-26 June transcript, and W. Bruce Philip, pp 36-70, June transcript.

(*****) Leon Monell, pp 206-211, August transcript.

Two witnesses mentioned that substitution and counterfeiting were evils attendant upon price demoralization. (*) Counterfeiting of trade-marked articles, of course, was against the law, but sometimes difficult to detect. There seemed little question of the undesirability of this practice, and if the proponents could convince NRA that price demoralization increased it, and that price stabilization might decrease it, they would have added weight to their side of the scales. The question of substitution was not so simple, however, since the practice took several possible forms. Its worst form involved wrapping up and delivering to the customer a substitute for the trade-marked product asked for, but in its lesser form it involved merely dissuading the customer from his original desires and selling him something else. If the sales talk involved false disparagement of the product ordered, it was unfair and perhaps illegal, but if it involved only legitimate selling tactics, there was little room for objection. Small druggists tended to label all forms of substitution an evil, principally because the practice, whether used fairly or unfairly, was the price cutters' customary method of selling his private brands. Though the proponents presented no figures showing an increase of counterfeiting and substitution under price demoralization, there was some logic behind their statements. A time of low prices on nationally advertised goods might conceivably produce an increase in the number of substitutes, both counterfeits and private brands, because the retailer could buy them cheap and make a good margin of profit even at a low selling price. One speaker introduced a note of patriotism by stating that most private brand toothbrushes were made in Japan, and continued substitution of them might ruin the toothbrush manufacturers of the United States. (**)

Leaving the question of substitution and counterfeiting, another harmful effect of price demoralization, according to a witness, (***) was that chains and large outlets sometimes cut prices purposely to destroy an independent so they could raise prices again without fear of competition.

Three witnesses (****) argued that price demoralization tended to deprive the public of its ability to purchase freely the articles cut in price. Two of these witnesses (*****) quoted from the dissenting

---

(*) George M. Sales, pp. 157-164, August transcript; and George W. Duncan, representing the N. H. Pharm. Assn., and a druggist himself for 41 years; also speaking for Rodney A. Griffin, pres., New England Rexall Druggists Assn., and representing the State Pharm. Assn. of Maine & Vermont; Transcript of August 35-36, 1933, pages 350 to 355.

(**) W. Bruce Philip, pp. 431-436 & 446-454, August Transcript.

(***) W. Bruce Philip, pp 431-436 & 446-454, August Transcript.

(****) Samuel C. Henry, pp. 211-215; George W. Duncan pp. 350-355; and W. Bruce Philip, pp 431-436 & 446-454 - all in August transcript.

(*****) Samuel C. Henry and W. Bruce Philip

---

opinion of Justice Holmes in the Miles Medical Co. case (*); and one of them (**) cited the report of the Federal Trade Commission to Congress on the Chain Store Investigation to the effect that unfair price cutting did more harm than good to consumers in the long run by impairing or destroying the manufacture and distribution of desirable articles. One witness illustrated the shortening of the life of a price-cut product by stating that Peruna had once been a fast-seller, but it was deeply cut in price. Soon it was no longer used much as a loss leader because it had become a dead item. (***) There was logic in this reasoning.

The choice of an article as a price leader depended usually upon its popularity with the public and upon the fact that all drug stores handled it, enabling the consumer to compare prices. As other cutters met or beat the price of the original cutter, however, the comparison became less obvious, and finally as prices continued to sink and small druggists found the item unprofitable, they ceased to handle it or at least ceased to feature it. At this point the product's usefulness as a loss leader ceased. Consumers had come to regard the cut price as the regular price rather than as a bargain, and the price cutters, finding no value in further cutting, but unable because of competition to raise the price, discontinued handling or featuring the item. The manufacturer lost his volume in that area, and the public lost its opportunity to obtain that product freely.

4. Causes of Price Demoralization

The proponents advanced several possible causes of price demoralization, the most obvious, of course, being loss leader selling. (****)

Five witnesses specifically mentioned loss leader selling, some

---

(*) The quotation from Justice Holmes was: "...I cannot believe that in the long run the public will profit by this course, permitting knaves to cut reasonable prices for ulterior methods of their own, and thus to impair if not to destroy the production and sale of articles which it is assumed to be desirable that the people should be able to get...."

(**) Samuel C. Henry

(***) W. Bruce Philip, pp. 36-70, transcript of June 7-8, 19[illegible]

(****) "Loss leader selling" is difficult to define. A "leader", roughly speaking, is an item sold at a bargain price calculated to draw customers into the store. A "loss leader" would seem merely to add the element of a loss, but the definition of a "loss" involves many factors. It may mean a loss based upon the actual cost of the item plus the cost of selling it, or it may mean a loss merely on the cost of the item. If one follows the theory that there is no loss if the store as a whole is making a profit, there is further complication. The small druggist used the term "loss leader" without attempting to distinguish its various meanings, but this in itself is significant, for it indicates that to him any item of a competitor was a loss leader if it were sold below a profitable price to the small druggist.

merely stating without elaboration that it was the primary cause of price demoralization, and others going into some description of how loss leader selling operated. (*) The theme of this testimony was that prices were cut low on branded items and the losses recouped by charging exorbitant rates for a large number of other products, the purpose being to impress the customer that everything in the store was cheap. One of the witnesses objected to the use by department stores of whole departments as loss leaders, saying that the department store could recoup the loss in its other lines, but the single-line merchant whose products were thus cut had no means of recovery. (**) This same witness quoted the Federal Trade Commission Report of January 15, 1932, as authority that losses on loss leaders were recouped by exorbitant profits on unknown and private brand goods.

Two witnesses indicated that the depression had accentuated price demoralization. Retailers, in a frantic effort to stop declining sales, had resorted to heavy price cutting, and competition soon forced the practice out of control. (***) Three witnesses (****) testified that the entrance of "price boards" into the drug field had caused an increase in the severity of price cutting. Another witness (*****) stated that some volume seeking manufacturers actually incited price cutting at retail to increase the sales of their products in certain areas.

5. Failure of Previously-Tried Remedies

To show that they had not been inactive in trying to help themselves out of their price-cutting difficulties, the proponents testified concerning the failure of remedies previously attempted. One witness (******) stated that the efforts of manufacturers to stabilize prices by refusal-to-sell and consignment selling were expensive and inadequate. This witness also stated that Congress had power to stabilize prices by legislation, but would not act without definite information upon the economic effects of its action. This same witness later testified (*******) that small druggists were engaging in cooperative buying, but

---

(*) The five witnesses were as follows:- At the August hearing: N. G. Hubbard, pp. 344-348; W. Bruce Philip, pp. 431-436 & 446-454; and G George M. Gales, pp. 157-164. At the June hearing: Roy M. Sterne, pp. 5-36; George M. Gales, pp. 71-89, and John Goode, pp. 138-149 & 388-392.

(**) W. Bruce Philip, pp. 431-436 & 446-454, August Transcript.

(***) George M. Gales, pp. 157-164, August transcript, and pp. 71-89, June transcript; and Roy M. Sterne, pp. 5-36, June transcript.

(****) George M. Gales, pp. 157-164; Roy S. Warnack, pp. 188-197, J. B. Pilchard, 521-533, all in August transcript.

(*****) John Goode, pp. 138-149, June transcript.

(******) W. Bruce Philip, pp. 431-436 & 446-454, August transcript.

(*******) At the June hearing. W. Bruce Philip, pp. 36-70.

---

that the movement was not as effective as it should have been because small druggists owed their wholesalers too much money. Furthermore, he stated, cooperative buying placed the wholesaler's operating expenses and problems on the shoulders of the retailers; and, since it was effective only on 500 out of the 10,000 items stocked by a drug store, the druggist had to rely on the service wholesaler for 9,500 items. If cooperative buying became too prevalent, the service wholesaler might raise the price on these 9,500 products.

6. Right of the Drug Trade to Special Consideration

Not only because it was logical for each trade to try to convince NRA that its problems were different from those of other trades, but also because the small druggists had a sincere professional pride, the proponents stressed the importance of the retail drug trade to the public health of the nation. Eight witnesses, at both hearings, covered this point.

One witness (*) stated that pharmacists compounded 250 million prescriptions each year, and that 200 million persons were ill annually in this country. He stated that more than 87% of all the drugs and medicines sold in the country were handled by drug stores. He point out that Federal and State governments recognized the importance of the druggist and controlled his activities through educational and registration requirements for pharmacists, and narcotic and pure food and drug laws. This witness alleged that the income from prescriptions, medicines and drugs was not enough to maintain a drug store and that the druggist had to sell other articles of merchandise to help carry the load. He alleged that the volume of business in the retail drug trade was 2 billion dollars per year, 54.8% of this amount being in drugs, medicines and prescriptions, and 45.2% in merchandise and commodities. He maintained that the selling of general merchandise permitted a reduction in the cost of prescription service to the public. He concluded by urging that the drug store, as a unit, professional and commercial, needed economic security in the interest of public health.

Other witnesses argued that the country needed its 60,000 drug stores, and that they should be kept in business even at the expense of higher prices. They stated that large price cutters, not stressing health service themselves, caused the public to distrust small druggists and to believe them profiteers. They added that cut prices tended to increase the number of sub-standard drugs on the market. (**)

One witness admitted that theoretical economic efficiency would require the Government to let the small druggist go bankrupt if he could

(*) R. L. Swain, pp. 20-27, August transcript; pp. 406-414, June transcript.

(**) Witnesses presenting these views were: T.F. Schuler, representing the Greater Kansas City Retail Druggists' Assn. (affiliated with NARD), pp. 329-331, August transcript; W. Bruce Philip, pp. 421-436 & 448-454, August transcript, and pp. 36-[illegible], June transcript; Geo. W. Duncan, pp. 350-355, Aug. transcript; Roy S. Warnack, pp. 188-197, Aug. transcript; Roy H. Sterne, pp. 5-23, June transcript; Dr. E.F.Kelly, Sec. of A.P.H.A. pp. 25-36, June transcript; John Goode, pp. 138-149, June transcript; and Dr. R. L. Swain, pp. 406-414, June transcript.

not maintain himself in open competition; but this witness argued that the same view of efficiency would applaud sweatshop wages as an excellent way to keep down costs of manufacture and distribution. The witness pointed out that since NRA was opposed to the latter type of efficiency, it should also oppose the former. (*)

7. Predicted Effects of Price Control

At the first hearing in August 1933, the proponents sought to clinch their case by visualizing for NRA's benefit the possible effect of price stabilization. They predicted that price stabilization would stop counterfeiting of trade marked articles[1]; end the "evil" of substitution[2]; increase wages and employment[3]; stop the sale of substandard drugs and aid the public health[4]; make quality and service, rather than price, the important elements of competition[5]; insure the distribution of merchandise[8], thereby benefitting the manufacturer[9]; bring prosperity to legitimate business, causing stocks to pay dividends[10]; increase sales and profits and decrease bankruptcies in the retail drug trade[11]; restore the public's faith in the small druggist[12]; and accomplish the greatest good for the greatest number of drug stores[13].

---

1. George M. Gales, pp. 157-164
2. Roy S. Warnack, pp. 188-197
3. Geo. M Gales, pp. 157-164; Samuel C. Henry, pp. 211-213, and Leon Monell, pp. 206-211.
4. Roy S. Warnack, pp. 188-197
5. Samuel C. Henry, pp. 211-213; J. B. Pilchard, pp. 321-336; and W. Bruce Philip, pp. 421-436 & 446-454.
6. W. Bruce Philip, pp. 421-436 & 446-454, and Roy S. Warnack, pp. 188-197.
7. W. Bruce Philip, pp. 421-436 & 446-454
8. W. Bruce Philip, pp. 421-436 & 446-454.
9. Samuel C. Henry, pp. 211-213, and W. Bruce Philip, pp. 421-436 & 446-454
10. Geo. M. Gales, pp. 157-164
11. Leon Monell, pp. 206-211; W. Bruce Philip, pp. 421-436 & 446-454, and J. B. Pilchard, pp. 321-336.
12. Roy S. Warnack, pp. 188-197
13. Geo. C. Egy, pp. 397-403.

(*) W. Bruce Philip, pp. 36-70, June transcript

B. Issues with Respect to the Manufacturer's Wholesale List Price Provision.

At the hearing in June 1934, the proponents assembled for the purpose of arguing upon two propositions: first, that their new loss limitation provision (the March amendment) was theoretically sound, and second, that its practical effects during 60 days of operation had been beneficial.* A great deal of the testimony was identical with that presented at the hearing in August, 1933. This is not repeated, and the following paragraphs deal only with the new arguments relating strictly to the manufacturer's wholesale list price type of loss limitation provision.

1. The Soundness of the Manufacturer's Wholesale List Price per Dozen as a Code Price.

One witness** quoted at length from the report of the NRA Committee on Distribution and Consumer Service Trade to the effect that no rule for preventing sales below cost could benefit the large majority of retailers unless the base price approximated the invoice or current market cost of the efficient smaller operator; and that the need for efficient small business establishments was fully recognized. Another witness*** stated that "cost" for the purpose of prohibiting sales below cost, should be the cost of the average dealer, since cost to the large dealer was too low, and individual cost too confusing.

Five witnesses****testified that the manufacturer's wholesale list price per dozen was the invoice cost of the large majority of dealers because these dealers purchased their goods regularly in dozen or less than dozen lots. One of these***** stated that it was impossible for a small druggist with limited capital to purchase all his items in greater than dozen lots, since the average stock of a drug store was worth only $5,000 and contained 10,000 items. He added that only on 100 to 150 items was there enough movement to permit purchases of 2 or 3 dozen at

---

* Testimony of the proponents upon the effects of the March amendment is presented herewithout regard to its weight or soundness to show the issues seen by the proponents - i.e., what sort of evidence upon the effects of the amendment did they think was important? Later, in Chapter VII of this Part, some of this testimony again appears, but for a different purpose, namely, to show the actual effects of the loss limitation provision. In Chapter VII the evidence is sifted for probable truth, soundness and relevancy.

** Dr. E. F. Kelly, pp. 26-36

*** Geo. M. Gales, pp. 71-89

**** Roy M. Sterne, pp. 5-26; Dr. E. F. Kelly, p. 26-36; W. Bruce Phillip, pp. 36-70; Samuel A. Weiss, exec.-sec., New York City Local retail drug code authority, pp. 363-387; and Geo. L. Secord, Pres., Chicago local retail drug code authority, pp. 393-406.

***** W. Bruce Philip.

a time. Another of the witnesses* presented statistical data** concerning retail drug stores in New York City, showing that 78% of them bought less than 35% of their needs directly from manufacturers, and 48% bought less than 20% of their needs thus. 68% of the stores bought more than 70% of their needs from service wholesalers, and 42% bought more than 80% of their needs from this source. The purpose of these figures was to show how few druggists were able to buy large enough quantities to deal directly with manufacturers and obtain discounts. The survey also showed that only 17½% of the stores bought anything from mutual wholesalers, and of these, 78% bought less than 30% of their needs from mutuals, and 60% bought less than 15% from this source, showing that few druggists obtained the special discounts or dividends paid by mutual wholesalers. The survey also showed that, of the stores buying from manufacturers directly, 2,130 bought in dozen lots, 1660 bought in greater than dozen lots, and 956 bought in less than dozen lots. Of the stores buying from wholesalers, 1,214 bought in dozen lots, 342 bought in lots greater than one dozen, and 3,440 bought in lots smaller than one dozen.*** To show that the majority of drug stores were relatively small, this witness also produced data from the same survey showing that of 2,350 stores reporting their volume of business, 11% had a volume less than $5,000 per year, 31% had a volume between $5,000 and $10,000, and 40% had a volume between $10,000 and $20,000.

Having introduced evidence that a large number of druggists bought in dozen lots or smaller quantities, the proponents sought to show that the price actually paid by druggists buying in these quantities was substantially equal to the code minimum price under the March amendment. The question, of course, was how much discount did druggists receive from wholesalers when buying in dozen and less than dozen lots. One witness**** testified that prices to the retailer on less than dozen lots had advanced since the approval of the March amendment because more wholesalers were quoting the net manufacturer's wholesale list price. Another witness***** stated that wholesalers' discounts in the majority of cases were of no material importance when considered in relation to total purchases. He added that wholesalers were cutting down these discounts. A third witness****** stated that the druggist might receive 10% from the wholesaler, but only on a few items, and that the

---

(*) Samuel A. Weiss, pp. 363-387.

(**) Questionnaire survey conducted by local retail drug code authority of New York City.

(***) These figures are difficult to understand without knowledge of the question used to secure them. This question was: "What is the size of your typical purchase on leading items: From the manufacturer?_____From the wholesaler? _____"

(****) Samuel A. Weiss, pp.362-287.

(*****) Geo. L. Secord, pp. 393-406

(******) Wheeler Sammons, pp. 150-204 & 388-392.

average wholesalers' discount was 7%. Of this, he stated, the druggist was in a financial position to secure only half, because he could not always pay cash; so the average discount taken was 3½%. The witness then pointed out that NRA's policy had permitted retailers to retain the benefits of cash discounts*, and these normally were two percent. Subtracting 2% from 3½% left 1½% as the average trade discount received by druggists from wholesalers.**

Having argued that the code price was very little above the small dealer's merchandise cost, the proponents discussed the amount of the differential between the cost of goods to the small and large dealer. One reason why this became an issue was that the presiding officer at the hearing was new to the entire loss limitation problem, having recently been transferred from another division of NRA. He considered it important to find out just how far the large dealers had to sell above their own costs under the March amendment; and he seemed impressed by statements of some of the cut-rate witnesses*** that they received discounts as high as 30%. The proponents hastened to produce evidence on the point. One witness**** stated that the manufacturer generally allowed no discount on 2 dozen lots, the usual minimum quantity for a discount being a gross. This witness also testified that the average discount for a gross was 12%. The president of the Liggett Drug Company***** stated that the average discount received by his company was 10% and 5%. Two manufacturers at the hearing testified upon this point. One****** stated that not more than 10% or 15 % of all the manufacturers of package medicines gave more than 15% and 2% discounts.

(*) In the old loss limitation provision, Article VIII of the Retail Trade Code, "cost" was defined as net invoice cost, less all discounts except discounts for prompt payment. Thus NRA sanctioned this much difference between actual cost and the code price.

(**) The fallacy in the above reasoning lies in the subtraction of the 2% cash discount after dividing the normal discount in half. In other words, if the normal discount of 7% contained a cash discount of 2%, the net trade discount must have been 5%. If the druggist received 5% trade discount and 2% cash discount upon only half the goods he bought, his discount on total purchases would have been 2½% trade and 1% cash discount. Leaving out of consideration the cash discount would have left the trade discount 2½%. The witness' figure of 1½%, thus, was in error, even assuming his initial data correct.

(***) See issues of opponents, infra.

(****) Dr. E. F. Kelly, pp. 26-36.

(*****) Geo. M. Gales, pp, 71-89.

(******) Frank A. Blair, president of the Centaur Co., manufacturers of a package medicine; also president of the Proprietary Association of America, an association of package medicine manufacturers.

The other* merely stated that his own quantity discount was 15%.

Throughout their arguments, the proponents took pains to state that the March amendment was not "price fixing". The witnesses on both sides realized the stigma attached to this term by years of court decisions, and the opponents used the term frequently in their arguments. The proponents, naturally, sought to counteract the effects of its use, by insisting that "price" stabilization" or "fair competition", rather than "price fixing", were the proper words to use.**

One witness*** added two additional points to the argument upon the theoretical soundness of the March amendment, saying that the fixing of a code minimum still left plenty of room for price competition above that level. This witness also stressed the basic simplicity of the provision and relative ease of proving violations.

(*) Earl A. Means, Vice President of Bristol-Myers Co., manufacturers of several package medicines and toilet preparations.

(**) Witnesses stressing this point were: Geo. M. Gales, pp. 71-89; John Goode, pp. 138-149, and Geo. L. Secord, pp. 393-406.

(***) Roy M. Sterne, pp. 5-26.

2. The Effects of the March Amendment after 60 days of Operation

Much of the testimony on the effects of the March amendment was mere opinion, though there was some effort to gather statistical information. The lack of better evidence was no reflection on the speakers since 60 days was too short a time for the trade to make a full adjustment to the new code prices, and too short a time for an adequate survey.

One of the points stressed was that compliance with the March amendment had been good. NRA was interested in this, since it did not wish to retain a code provision that was too difficult to police. One witness* estimated that 99% of the drug volume of business was in compliance, and another* stated that "a prominent and reliable drug company official" whose work brought him in contact with all sections of the country believed prices were 99.1% observed. A third witness* produced the results of a questionnaire sent by the National Retail Drug Code Authority to its local bodies. 130 of the local code authorities had replied, the compilation of their returns being as follows:

No. of violations reported	1,491
Range per local code authority	210 to 0
No. of hearings held	1,258
No. of complaints adjusted	1,245
No. pending as of May 15, 1934	235

The witness stated that of the complaints pending, 195 were concentrated in 5 cities; Los Angeles, Newark, Fort Worth, Birmingham, and Freeport, Ill.; and that all the complaints in Los Angeles, numbering 97, were violations of one store. He stated that, in 7 cities, from 2 to 5 complaints were pending; in 15 cities, one complaint was pending; and in 103 places no complaints were pending.

Another witness* submitted the following statistics for New York City covering the period from April 8 (effective date of the March amendment) to May 15, 1934:

No. of complaints reported	3,247
Rejected	120
Valid	3,127
No. adjusted by code authority	2,745
No. sent to NRA office for adjustment	382
No. reported against chains	43
No. reported against department stores	313
No. reported against drug stores	1,827

(And, since there were 4,500 drug stores in the city, this was one complaint for every three stores.)

(*) J. Bruce Kremer, representing the Drug Institute of America, Inc., pp. 118-123.
(**) Roy M. Sterne, pp. 5-26.
(***) Wheeler Sammons, pp. 150-204 & 388-392.
(****) Samuel A. Weiss, pp. 362-387.

No. reported against cosmetic shops..... ... .994
(And since there were 357 cosmetic shops in the area, this was almost 4 per store.)
No. reported against miscellaneous outlets..... 38
Total No. of stores violating.....706
No. violating only once.....439
No. violating only twice.....176
No. violating 3 times..... 48
No. violating 4 times..... 21
No. violating 5 times..... 3
No. violating from 6 to 10 times..... 19

The witness added that, though 706 stores had violated between April 8th and May 15th, the number violating between May 16, and 31, 1934, was only 77.

Perhaps the most important issue in the minds of the proponents was whether the March amendment had caused prices to the consumer to go up or down. Because of the short time between the effective date of the amendment and the public hearing, little factual data was available, but the witnesses presented considerable opinion evidence to the effect that the consumer was paying less for his drug and cosmetic items than before. Five witnesses* spoke on this point. To substantiate their views, the proponents argued that the lowering of consumer prices was a logical effect of the code price for two reasons: First, because manufacturers whose products had been very rely cut in price would lower their manufacturer's wholesale list prices to prevent their retail prices from rising too fast; and second, because only a few items had been sold at cut prices, prior to the amendment, while many were sold higher, and the code price would draw more prices down than up.

Four witnesses** testified concerning price reductions by manufacturers. One of these stated that, since the approval of the March amendment, 15 prominent drug manufacturers had reduced their wholesale list prices per dozen. After the hearing, in October, 1934, this witness*** submitted a letter to FTA with a list of practically all manufacturers' price reductions and increases. A total of 30 manufacturers had lowered their prices on 61 items; a total of 6 manufacturers had raised their prices on 20 items. Another of these witnesses* stated that, of the 1,000 items on the National Retail Drug Code Authority's minimum price list, there were 60 manufacturers' price changes between November 1933 and May 1934. On 54 the price was lower. On 4 the price was raised, but not quite enough to cover the Federal excise

---

(*) Roy L. Sterne, pp. 4-26; Dr. E. F. Kelly, pp. 26-36; W. Bruce Philip, pp. 36-70; John Goode, pp. 138-148, and Samuel A. Weiss, pp. 362-387.

(**) Geo. L. Coles, pp. 71-89; John Goode, pp. 138-149; Wheeler Sammons, pp. 150-204 & 388-393; and Geo. L. Secord, pp. 393-406.

(***) The witness was Geo. L. Coles, pp. 71-89. His letter, date 10/30/34 is in the folder marked "Prices II", Deputy's files. He stated that the list was compiled by Mr. L. E. Durfor of the Liggett Drug Co., and contained all products that "amounted to anything". There were a few obsolete or slow-selling items not on the list, but Mr. Durfor's impression of these was that more went down than up in price.

9726

tax; and the consequent absorption of this tax by the manufacturer resulted in a slight price reduction. On 12 items the manufacturer had raised the price but only enough to cover the tax; so the net effect was no change in price. On 3 products the apparent increase in price was actually not an increase for some other reason, not explained. On only 7 products did the manufacturer effectively raise the price, but the average increase was only 11.6% as opposed to an average decrease, on those decreased, of 15%.

Two witnesses argued the proposition that the code price attracted more prices down than up. One stated that the minimum price tended to become the maximum. (*) Another (**) presented a lengthy analysis of the whole problem from the consumer's viewpoint. He stated that the small druggist under laissez-faire was oppressed by three factors: (a) Loss of gross profit on goods sold below his cost; (b) Shifting of his volume of business to cut-raters, and (c) Demoralization and uncertainty caused by unfavorable price trends. According to witness, the consumer had no interest in volume shifts or the small druggist's loss of morale, and was interested in sales below cost only insofar as they enabled him to buy cheaply. However, to stop the small druggist's loss of gross profit required raising prices only upon a relatively few items used as loss leaders, and this action would also solve the other two problems - shift of volume to cut-raters, and loss of morale. The witness stated that prices would have to be raised only in stores of more than $1000,000 annual volume of business, since smaller stores did not meet deep price-cuts. These stores, he said, did only 18% of the country's volume of drug store business, but the entire 18% would not rise in price because only in a dozen cities had there been extreme price cutting; hence only about 10% of the drug store volume was affected. Of this 10%, he went on, only about 1/3 was in drugs and toiletries, and only about one-half of that was in fast-selling items; so only 1-2/3% of the national volume of drug store business would rise in price. Furthermore, since the lowest price cut was only 10% below the manufacturer's wholesale list price per dozen, the increase would be negligible; and to offset it, the consumer could expect lower prices on many items.

This witness then pointed to the short-lived New Jersey Retail Drug Code where the minimum price was the manufacturer's wholesale list price per dozen plus 15%. (***) Under this, he said, 115 drug stores reported that of all products changed in price, 44.1% were raised and 55.9% were lowered.

(*) Geo. H. Gales, pp. 71-89

(**) Wheeler Sammons, pp. 150-204 & 388-392

(***) The State of New Jersey, having its own recovery administration, approved a state code with a code price exceeding that of the national code by 15%, but it remained in effect only a short time.

The witness argued that the national code might not produce so many price decreases because few druggists could afford to sell as low as the manufacturer's wholesale list price per dozen; and he drew the conclusion that a higher minimum price meant a greater number of price decreases in proportion to the increases.(*)

Reduction of prices to the consumer was the proponents' principal theme, but they argued, also certain incidental effects. Three witnesses(**) stated that the March amendment had increased the small druggist's sense of security and confidence. One of the witnesses(***) presented the results of a questionnaire circulated in New York City, showing that 1,827 druggists felt the March amendment had helped their business; 381 said it had not helped their business; 11 said their business had not changed, and 108 did not reply. One Witness(****) stated that the March amendment had permitted small druggists to enter into price competition, where prior to the amendment they had been afraid to do so because of the danger getting beyond their depth. Another witness(*****) introduced a tabulation of questionnaires from New York City showing that 1,478 druggists had a greater sales volume in April and May 1934 than in April and May, 1933; 731 druggists had less volume, 174 had the same, and 139 did not reply.

III. Issues Seen by the Opponents of Price Stabilization.

The issues seen by the opponents, like those of the proponents, were divisible into two parts: first, issues with respect to price stabilization as a general principle, and second, issues with respect to the manufacturer's wholesale list price per dozen type of loss limitation provision.

A. Issues with Respect to Price Stabilization in General.

Witnesses for the opponents charged, in broad language, that any form of price control would tend to eliminate competition among retailers, promote monopoly among manufacturers, lead to inefficiency in the distribution system, destroy the initiative of business, and lead more and more toward Government control of industry.(******)

(*) This might be true up to a certain point, but the point would be difficult to determine.

(**) Roy B. Dierne, pp. [illegible]; Samuel A. Weiss, pp. 382-387; and Geo. L. Moore, pp. 392-406.

(***) Samuel A. Weiss.

(****) Dr. E. F. Kelly, pp. 22-31.

(*****) Burwell B. Bliss, pp. [illegible].

(******) The following witnesses testified upon these broad points: Myron Melvin Cohen, Washington Attorney for R. H. Macy & Co., New York City, and Katz Drug Co., Kansas City, pp. 283-293 of August transcript; Maurice Singer, representing the Associated Retail Druggists of America, pp. 386-405 of August transcript, (note that Mr. Singer's testimony in the August transcript was almost word for word identical with that of Mr. Cohen); Q. Forrest Walker, economist for R.H. Macy & Co., New York, pp. 260-270 of August transcript; and pp. 689-711 of June transcript; Irving C. Fox representing the National Retail Dry Goods Assn., pp. 274-278 of August transcript (note that the recorder, through error, listed Mr. Fox in the August transcript as C. W. Smith. Mr. C. W. Smith was an Assistant Deputy Administrator in NRA).

One witness (*) stated that there were too many drug stores in existence, and that it was too easy for inefficient units to enter the trade and to remain in it. He argued that the efficient merchant needed no price protection. This witness added that 85% of the leading economists of the country had condemned price-fixing(**); and that the Federal Trade Commission, in its report to Congress on the Chain Store Investigation had stated that price maintenance legislation was not called for. Another witness (***) alleged that the American Federation of Labor had always opposed price fixing.

Four witnesses(****) testified that price-fixing provisions in the code would raise the cost of living and gouge the consumers. One of these witnesses(*****) testified that retail prices would be unable to decrease with reductions in manufacturing and raw material costs. The other three of these witnesses connected their argument with one of NRA's basic principles by stating that price fixing would cause a sudden rise of consumer prices ahead of purchasing power, thus impeding recovery.

One witness(******) sought to strike at the roots of the small druggists' arguments. He alleged that price-fixing in the code would not accomplish its objective of stopping predatory price cutting; and would merely tend to diminish the volume of drug products sold, to the detriment of the entire industry, including the small druggists.

One witness(*******) urged that price-fixing would cause the cash and carry store to suffer because it could not undersell the store offering credit and delivery service, and if both sold at the same price the customer would choose the latter.

Another witness (********) contended that, if a price-fixing scheme were approved, it should include a differential for cash and carry stores, permitting them to sell from 12% to 15% below the minimum price otherwise applicable. The witness claimed that his clients had studied the cost of delivery service and found that it cost 10¢ or more to make a delivery in Kansas City, and that the average delivered order was less than 50¢, making the cost of delivery 20%.

(*) Q. Forrest Walker, pp. 260-270 of August transcript, and pp. 89-117 of June Transcript.

(**) He cited a survey conducted in 1931 covering all members of the American Economic Association.

(***) Irving C. Fox,(listed as C. W. Smith), pp. 274-278 of August transcript.

(****) Q. Forrest Walker, pp. 260-270; Myron Melvin Cohen, pp. 283-293; Maurice Singer, pp. 356-365; and Frances Kneitel, Attorney for the National Independent Pharmacists, Inc., of New York, pp. 338-342 (all page numbers given are in August transcript.)

(*****) Q. Forrest Walker

(******) Q. Forrest Walker, pp. 260-270, August transcript.

(*******) Q. Forrest Walker, pp. 89-117, June transcript.

(********) Paul Stinson, attorney for Katz Drug Co., Kansas City, and Fred Meyer, Inc., Portland, Oregon, pp. 261-393 June transcript

He added that costs of credit and collection were from 3% to 5%; and that consumers who did not want these services should not have to pay for them. A third witness (*) urged that a cash and carry differential was absolutely essential.

Four witnesses for the opponents presented considerable testimony rebutting the proponents' claim that the drug trade needed special consideration because of its public health aspects and because it was in bad financial condition. One witness (**) testified that drug stores suffered worse from the depression than other retail outlets. He cited a report of the University of Illinois, entitled "Business Mortality of Illinois Retail Stores, 1925-30", and a report of the University of Buffalo, entitled "Mortality in Retail Trade", to show that the drug trade had a greater longevity than other retail trades. (***) This witness also stated that the modern drug store was a general merchandise store and should be able to overcome lower profits on drugs by higher profits in other lines, notably soda fountain products. He added that there was no evidence that drug products in a well-managed store bore a starvation mark-up. (****) Another witness (*****) testified that the credit

---

(*) Frances Kneitel, pp. 204-235 & 415-433, June transcript.

(**) Q. Forrest Walker, pp. 89-117, June transcript.

(***) One of the proponents, Samuel A. Weiss, pp. 362-387, June transcript, disputed Mr. Walker's statements on this subject, stating that the sample covered by the University of Buffalo's report was too small. Weiss introduced a statement of the Bureau of Business Standards, Inc., Chicago, to the effect that the life expectancy of hardware stores was better than that of drug stores, and that the expectancy of drug and grocery stores was about equal.

(****) One of the proponents, Samuel A. Weiss, also disputed the statement that drug stores could make up their profits on other lines than drugs. He quoted from a survey of New York Drug Stores, the following figures: 73% of stores with fountains did less than 20% of their total business in fountain products, and 45% less than 10% in these products. 90% of the stores did less than 6% in these items. 87% of the stores did less than 10% of their business in candy, and 85% did less than 6% in this product.

(*****) Frank Milne, representing the Miller Drug Stores of Ohio and Pennsylvania, a small chain of cut-rate stores; pp. 619-634 June transcript

status of suburban drug stores was not nearly as bad as the proponents had painted it; and added that the so-called ethical drug stores were actually no more ethical than the cut-raters. He stated that the pushing of substitute products was a practice not confined to cut-raters, but practiced by all stores that had any substitute products to push. One witness (*) stated that drugs were no more necessary to health than food, yet no drastic price protection appeared in the Retail Food and Grocery Code. Another witness (*) stated that the cut-raters saved money for the public, and that consumers did not need and did not want to pay for the type of service some drug stores offered.

Some of the opponents thought it important to show the existence of a wide difference between consumer prices and manufacturing costs of products in the drug industry. Two witnesses (**) objected that price fixing would permit the manufacturer to set exorbitant consumer prices, as much as 2,000% in excess of manufacturing cost. Another witness(***) stated that the mark-up of drug manufacturers was 500% and higher, and that the manufacturers with the longest margins were the ones most in favor of price maintenance.

Individual witnesses for the opponents raised a number of miscellaneous issues. One witness (****) stated that "destructive price cutting", as the anti-trust laws defined the term, could never exist in the retail drug trade, because there could be no restraint of trade and no monopoly. For example, he stated, if a large store cut the price on a toothpaste, there were still 40 other brands of toothpaste on the market, and the store could secure no monopoly nor even severaly restrain trade in the commodity. This witness also pointed out that, to be destructive, price cutting must actually destroy trade, a fact requiring definite proof. Another witness (*****) stated that, in his opinion, it was good advertising to sell goods below cost to attract customers to the store. Two witnesses (******) stated,"It is a well-known fact that no store can invariably make a profit on each separate article that it sells, and every merchant considers his business as a whole and seeks to make a profit on the entire turnover rather than a separate profit on each article. Another witness (*******) stated that, though less than 1/3 of all the drug stores did over $30,000 worth of business per year, this one-third did 2/3 of the total drug

---

(*) The witness was Paul Stinson, pp.261-393, June transcript. The approved loss limitation provision in the Retail Food and Grocery Code was individual invoice or replacement cost, whichever was lower, plus a 6% labor mark-up. This was comparable to the loss limitation provision of the Retail Trade Code, covering druggists prior to the March amendment. Maurice Singer, pp. 124-135 & 528-539, June transcript.

(**) Myron Melvin Cohen, pp.282-293, and Maurice Singer, pp. 124-385, both in August transcript.

(***) Paul Stinson, pp.261-393, June transcript.

(****) Q. Forrest Walker, pp. 89-117, June hearing.

(*****) B. L. Klein, cut-rate druggist, Cleveland;pp.135-136, June hearing.

(******) Myron Melvin Cohen,pp.283-293,August transcript,and Maurice Singer, pp.356-365, August transcript.

(*******)Francis Kneitel, pp.204-235 & 415-433, June transcript.

drug business of the country. This witness also alleged that the small cut-rater needed price appeal as a weapon to compete with the large chain's advertising advantages.

B. Issues with Respect to the Manufacturer's Wholesale List Price per Dozen as a Code Minimum.

At the public hearing on June 7th and 8th, 1934, the opponents vigorously attacked the principle of the March amendment, and contended that its effects during 30 days of operation had been detrimental. Three witnesses attacked the (*) manufacturer's wholesale list price per dozen on the ground that it was a fictitious figure used merely as a base for the granting of discounts, and not representative of anyone's cost. They termed it a "vicious principle of price fixing." One of these witnesses (**) stated that the March amendment failed to consider varying costs of handling slow and fast-moving items, and failed to consider sales volume as a factor in the determination of cost. Furthermore, she stated, the manufacturer's wholesale list price per dozen was not even the cost of small druggists, since wholesalers' discounts were from 10% to 20% in dozens, or even in less than dozens, taking into account free goods, rebates, and cash and trade discounts. She added that the small druggist in New York City received a discount of 10% plus 2% from the wholesaler. Another of these witnesses (***), to show that the manufacturer's wholesale list price was not the small druggist's cost, produced a list of products sold by the McKesson-Faxon Wholesale Drug Co. of Kansas City, showing the manufacturer's wholesale list price per dozen and McKesson's price in lots from 1/12 of a dozen up. The list covered 113 items and the range of discounts was from 10% to 15%. This witness also testified that by careful buying in fairly small quantities a druggist could obtain a 30% discount, and by buying $50 worth at a time, could obtain 33-1/3%. This witness alleged that almost 50% of the total drug sales in Portland, Oregon, were made by chains, department stores, and buying pools receiving large discounts from the manufacturer's wholesale list price per dozen, hence the proponents were wrong in stating that the vast majority of druggists bought at the manufacturer's wholesale list price.

(*) The witnesses were: Q. Forrest Walker, pp. 89-117;
Frances Kneitel, pp. 304-335 & 415-433; and
Paul Stinson, pp. 261-393.

(**) Miss Kneitel.

(***) Paul Stinson, pp. 261-393.

Three witnesses stated (*) that the March amendment gave too much power to the manufacturers to manipulate the code price to suit their own interests. Five witnesses testified that large stores, buying in quantity, received big discounts from the manufacturer's wholesale list price per dozen. The presiding officer at the hearing was greatly interested in this testimony, since he wished to know how far about their own merchandise costs the March amendment required large stores to sell. One witness (**) stated that he received an average discount from the manufacturer's wholesale list price of 30%, and estimated that his cost of doing business averaged 14%. He said that he carried a line of 10,000 or more items, but did not stock heavily on slow-moving items. He added that the whole basis of the cut-rater's policy was to keep down costs by rapid turnover. A second witness (***) simply stated, without elaboration, that he received large discounts by buying in quantity directly from manufacturers. A third witness (****) stated that members of her association received from 10% to 20% discount by buying directly from manufacturers, and had an overhead ranging from 12% to 14%. She stated that the March amendment, by requiring her members to sell at the code price, sanctioned profiteering. A fourth witness (*****) stated that his client had an overhead expense of 15% and received discounts from the manufacturer's wholesale list pricein excess of 15%. The fifth witness (******) submitted a list of 38 products showing his own regular discounts on quantity purchases and alleging that he obtained them through normal trade channels and not through bankruptcy sales or other irregular means. He stated that they were manufacturers' deals available to anyone who bought the same quantity at the same time as the witness. Every discount on the list was

---

(*) Francis Kneitel, pp.204-233 & 415-433; Paul Stinson, pp.261-393; and Samuel H. Miller, cut-rate druggist and vice-chairman of the Local Retail Drug Code Authority of the 20th Congressional District of Ohio; pp.599-614. Mr. Miller classed himself as the only cut-rater that was a member of a local drug code authority.

(**) Maurice Singer, pp.134-135 & 528-539.

(***) B. L. Klein, pp.135-136.

(****) Frances Kneitel, National Independent Pharmacists, Inc., New York City, pp.204-235 & 415-433.

(*****) Paul Stinson, speaking for Fred Meyer, Inc., Portland, Oregon, pp.261-393.

(******) Mr. Donn (initials not given), owner of the Ethical Pharmacy, a cut-rate drug store, New York City, pp. 433-471.

above 20% and a few over 30%. (*)

In addition to the witnesses upon this point, one written brief (**) filed in the transcript stated that the code minimum price under the March amendment was from 15% to 20% above the cost of goods to large buyers.

Three witnesses urged that the March amendment was unenforceable and that compliance under it was bad. One (***) stated that large stores' prices were easy to check, but those of small stores were not, and no local retail drug code authority was equipped to police thousands of stores' prices upon thousands of items. This witness stated that 80% to 90% of the stores in New York City were violating the code price on some item. His client, he stated, had shopped two days and found 76 stores in violation of 194 items. Furthermore, he pointed out, the code price was subject to constant fluctuation as manufacturers changed their base prices or dozen-lot discounts and deals, and the trade was entitled to prompt notice of such changes. He alleged that the local code authorities were not performing this function satisfactorily, and that the code authority price lists were bad. Another witness (****)

(*) This testimony produced some controversy at the hearing. Mr. Dahl Means, vice-president of the Bristol-Myers Co., a manufacturer, arose on the side of the proponents, at the call of the presiding officer, to state that Mr. Donn's large discounts were loss leaders of wholesalers, plus manufacturers' free goods. He explained that wholesalers, as well as retailers, used loss leaders to attract trade, and intimated that if NRA corrected loss leader selling throughout all branches of the industry, Mr. Donn's discounts would disappear. Another witness then arose on the side of the opponents, Mr. M. Weissbard, owning 3 cut-rate stores in Newark, N. J., and denied Mr. Means statements. Weissbard said that Mr. Donn's discounts were not wholesalers' loss leaders, but discounts of manufacturers. Mr. Means testimony appears on pages 437-477, and Mr. Weissbard's on pages 466-471, of the June transcript.

(**) Brief of Texas Merchants Assn., and Leonard Bros., by Charles P. Swindler, Attorney. Page 32, Supplement No.1 to transcript of June hearing.

(***) The witness was G. Forrest Walker, economist of R. H. Macy & Co., New York, pp. 89-117. His reference to the failure of Code Authorities to give notice of price changes applied principally to the difficulties under the "last proviso", largely eliminated by the approval of the September amendment. See Chapter IV of this part, page 69 et. seq.

(****) Paul Stinson, speaking for the Katz Drug Co., Kansas City, pp. 201-203

testified that the March amendment was unenforceable because of the impossibility of keeping track of the code price on thousands of items. He presented 32 letters sent to local retail drug code authorities by his client complaining of violations under the Retail Drug and Retail Food and Grocery codes in his client's territory. These letters contained 52 complaints under the drug code. The third witness (*) on this point testified that small untorn druggists sold below the code price with impunity while the downtown stores stood in fear of investigation by the local code authority. He stated that in the parts of Ohio and Pennsylvania where he operated, there was no compliance with the code price; and that, though he tried to comply at first, he was forced to give it up as a bad job. This witness stated, in connection with the policing of code prices by code authorities, that the local drug code authority for the 20th district of Ohio had been hand-picked by the drug trade associations without any election, and that he believed the same thing happened elsewhere. (**) Another witness (***) objected that the National Retail Drug Code Authority was not an elected body, and that one of its members was not even a member of the trade. She also objected to the representation of the Drug Institute of America on the Code Authority. (****)

As in the case of the proponents, one of the most important issues to the opponents was the question of consumer price trends under the March amendment. One witness (*****) stated, without elaboration, that consumer prices had advanced. Two others (******) argued that the lack of manufacturers' price advances was misleading and did not mean that prices would not advance after the hearing. They argued that manufacturers would naturally not raise the prices prior to a hearing on the

---

(*) Frank Milne, pp. 613-654.

(**) NRA regulations provided for an open election of each local code authority except in unusual cases, such as New York City, where local trade associations appointed the representatives.

(***) Frances Incitel, pp. 204-255 & 415-433.

(****) The code established the National Retail Drug Code Authority with two representatives from the N.A.R.D. and one each from the A. Ph.A., and the Drug Institute of America, Inc., and such other representation from any national trade association as might be approved by the Administrator. In November 1933, the Administrator approved a representative of the National Association of Chain Drug Stores. The code provided for no open election of these members, and since the cut-raters had no national trade association, they received no seat on the Code Authority.

(*****) Maurice Singer, pp. 124-135 & 528-539.

(******) Irving C. Fox, pp. 247-261; and Paul Stinson, pp. 261-393

effects of a provision favorable to their interests.

One witness (*) testified that in his own store he raised 300 or 400 items to the code price under the March amendment. He admitted that he lowered some also. Another witness (**) testified that one of his clients had raised 120 items to the code price, the average increase being 20.51%, and that another client, by picking 7 items at random found his average increase was 13%. This witness also pointed to an article in Drug Trade News showing that Hook's Drug Stores in Indianapolis had an average price increase on account of the March Amendment of 34%, the survey covering 15 items.

Four witnesses for the opponents warned NRA to scrutinize carefully the motives behind the alliance of the chain drug store with the small independent. One witness (***) stated that uneconomic operation and topheavy managerial expense had driven the chains into the alliance. Three witnesses (****) alleged that the March amendments would tend toward a monopoly on the part of the chains because with standard brands kept high in price, the chains could take over the market with their private brands. They added that small druggists could not handle private brands, and in any event had not the advertising facilities of the chain for pushing them. One witness (*****) quoted from the Federal Trade Commission's report on Chain Store Private Brands to show that sales of these products were increasing. In 1928, private brand sales were 14.8% of total sales in 7 chains (a total of 46 companies), while in 1930, this percentage had increased to 28.9%. For 17 chains (a total of 77 companies), the percentage was 22.2% on 1928 and 26.6% in 1930. The witness added that his own firm had increased the number of its private brand drug items since the approval of the March amendment, and that other large stores were doing likewise.

One issue looming large in the minds of the opponents was whether the manufacturers had had anything to do with the retail druggists' movement for price protection under NRA. There was doubtless good psychology in making an issue of such a point, since years of court

---

(*) L. L. Klein, pp. 135-136

(**) Paul Stinson, pp. 381-393.

(***) Maurice Singer, pp. 134-135 & 528-539

(****) G. Forrest Walker, pp. 89-117;
Frances Kneitel, pp. 204-235 & 413-433; and
Paul Stinson, pp. 381-393.

(*****) G. Forrest Walker, pp. 89-117.

decisions had fixed the idea in the public mind that manufacturers' efforts at price maintenance were largely efforts to gouge the consumer. Three witnesses testified that manufacturers had had a heavy hand in the efforts to establish the March amendment. One (*) charged that the whole effort was a ruse of manufacturers to obtain resale price maintenance refused them long ago by Congress. Another witness (**) alleged that an agent of his client had attended meetings prior to the June hearing where manufacturers and jobbers were urged not to change their prices or discounts until the uncertainty concerning the March amendment was settled.

A third witness (***) alleged that manufacturers desiring to control the retailer and mulct the public, had dominated the retail drug trade association. (****)

Seeking, as they had done at the August hearing, to attack price maintenance at its foundation, its opponents sought to show that the March amendment would not accomplish its purpose of protecting small druggists. One witness (*****) urged that the amendment would harm the small retailer by encouraging price cutting. He stated that prior to the amendment retailers sold relatively few items at cut prices because of the heavy losses involved, but that under the amendment, more and more items would fall to the code price. Another witness (******), to show that small druggist would tend to lose sales under the March amendment, stated that the New Jersey Retail Drug Code, with its 15% mark-up above the manufacturer's wholesale list price per dozen, had caused the public to stop buying drug products. A third witness (*******) urged that the existence of the minimum code price was causing manufacturers and wholesalers to take away from small druggists the special discounts previously allowed; so that the small man was paying more for his goods than before. (********)

(*) Irving C. Fox, pp. 247-261.

(**) Paul Stinson, speaking for Katz Drug Co., Kansas City, pp. 261-303.

(***) C. Forrest Walker, pp. 89-117.

(****) John Dargavel, secretary of the N.A.R.D., speaking after Mr. Walker, stated that he resented the claim of conspiracy between retailers and manufacturers. See pp.642-643. June transcript.

(*****) C. Forrest Walker, pp. 89-117.

(******) Francis Kneitel, pp. 204-235 & 415-433.

(*******) Paul Stinson, pp. 261-303.

(********) This argument was somewhat inconsistent with previous arguments of the opponents that wholesalers' and manufacturers' discounts to small druggists made the merchandise cost of these dealers lower than the code price.

Perhaps realizing that they could not hope for complete abandonment of all price fixing clauses in the code, the opponents argued strongly for the re-establishment of the old "invoice cost plus a labor mark-up" provision. One witness (*) stated that this clause was better than the March amendment because it allowed the meeting of competitive prices below the code minimum, and was self-enforcing in that the store wishing to meet an offending price had to report it to the code authority. Another witness (**) suggested that a "cost plus 10%" clause would permit the small dealer more readily to sell above the code minimum since it would not be fixed or widely-known base price. The manufacturer's wholesale list price per dozen, he urged, was so well-known and so inflexible that it tended to become the maximum as well as the minimum price. Six other witnesses (***) stated, without much elaboration, that, in spite of their opposition to price fixing, they would not oppose a clause based on invoice cost plus a mark-up. Two of them specifically mentioned 10% as the proper mark-up; three mentioned no particular mark-up; and one contended that 5% would be sufficient to cover labor costs upon some fast moving items because of their rapid turnover.

(*) Q. Forrest Walker, pp. 89-117.

(**) Irving C. Fox, pp. 247-261.

(***) Frances Kneitel, pp. 204-235 & 415-433;
Paul Stinson, pp. 261-303;
Mr. Donn, pp.455-477;
L. Weissbard, pp. 486-471;
Samuel H. Miller, pp. 590-614; and
Frank Milne, pp. 619-634.

ADMINISTRATIVE PROBLEMS AND INHERENT DIFFICULTIES
IN THE LOSS LIMITATION PROVISION

CHAPTER VI

I. Manipulation of Prices by Manufacturers

The September amendment omitted the "last proviso" of the March loss limitation provision and added a paragraph, commonly called the "second paragraph", empowering the Administrator to suspend or modify the provision in instances of price manipulation by manufacturers.

The principle of loss limitation in the retail drug trade was to peg minimum prices at the cost of the goods to the small dealer; and NRA chose the manufacturer's wholesale list price per dozen as the code price because members of the Code Authority had insisted that this was the closest practical approach to the small dealer's cost. The small druggists naturally wanted a code price higher than the mere cost of their goods, as stated previously, and NRA received, during the existence of the Retail Drug Code many letters and telegrams from small druggists and associations of small druggists asking for mark-ups ranging from 10% to 27%.

The Deputy was definitely opposed to all suggestions for a mark-up; the Consumers' Advisory Board and Research and Planning Division opposed it consistently, and one or two members of the National Industrial Recovery Board questioned whether the provision was truly designed for loss limitation or for arbitrary price-fixing. The National Retail Drug Code Authority, while wanting more price protection for small druggists, realized the danger of asking for too much at one time. They felt it far better to keep what they had than to reach for more and lose all.

NRA's opposition to a mark-up extended also to attempts by manufacturers to grant an indirect mark-up by discounts, free deals or rebates to small-lot purchasers. The fear that manufacturers might make such attempts motivated NRA to include the "last proviso" in the March amendment, requiring the deduction of dozen-lot discounts, free deals and rebates in the computation of the code price. So long as this proviso remained in the code, only the existence of wholesalers' discounts kept the code price from exactly equalling the cost of the goods to the small dealer.

When NRA deleted the "last proviso" on September 21, 1934, there was real danger that the manufacturer's wholesale list price per dozen might become less than the small dealer's cost, not only by the amount of wholesalers' discounts, but by the amount of manufacturers' discounts also. Wholesalers' discounts were limited by the amount wholesalers received from manufacturers; but there was hardly any limit on what manufacturers could give away.

The second paragraph of the September amendment was designed to check over-generous manufacturers and keep the code price reasonably equal to the small dealer's cost. NRA had hoped, through this paragraph to suspend or modify the loss limitation provision, promptly

after its approval, as to all products having dozen-lot discounts or free deals. One official recommended that offending products be removed entirely from the operation of the clause and left open to price-cutting. Such a procedure, he felt, would be less confusing than requiring the deduction of the objectionable discounts in the computation of code prices.*

The National Retail Drug Code Authority, especially members representing the National Association of Retail Druggists took a different position. The National Association of Retail Druggists militantly wanted all the price protection it could secure for the small druggist, and fought hard for the indirect mark-up afforded by dozen-lot free deals, discounts and rebates.

The misunderstanding between NRA and the Code Authority emerged at a meeting of the latter on October 5, 1934.** The Code Authority argued that NRA had known of the free deals and discounts available to small druggists and, having decided that their effect was negligible, had approved an amendment ignoring these deals in the computation of the code price. Consequently, NRA had placed its seal of approval on all manufacturer's deals existing as of September 21, 1934, and had power to curb only such manipulations as occurred after that date.

There was technical reasonableness in the Code Authority's stand. The second paragraph of the loss limitation provision stated that the Administrator should act when a manufacturer was manipulating his prices "because of" the provision. Therefore, in spite of the fact that existing deals ranged between one free with a dozen and three free with a dozen, giving small druggists a mark-up of 8% to 25%, NRA agreed to leave these deals alone. In return, the code authority agreed to search diligently for instances of manipulation occurring after September 21 and the Legal Division of NRA devised an orderly procedure whereby the Code Authority was to send a mild letter to each offending manufacturer pointing out the objection to his policy and asking his future intentions. If the manufacturer failed to correct his prices, the Code Authority was to send a stronger letter; and if he still maintained his objectionable price structure, the Code Authority was to refer the case to NRA. NRA planned to take prompt action against one or two manufacturers as an example to the others.

Unfortunately, the Code Authority's desire to preserve the benefits of free deals for the small druggist interfered with its duty to investigate manipulated prices. To the date of expiration of the Code, the code authority never, of its own initiative, discovered a single case of manipulation. NRA discovered a few and cut-rate druggists throughout the country reported a few. There were doubtless many more cases in existence but NRA had no facilities for discovering them.

(*) This recommendation is contained in a memorandum from Mark Merrell to Deputy Harry C. Carr, 10/9/34; folder marked "Memoranda"; Deputy's files.

(**) See Minutes of meeting, folder marked "Meetings"; Deputy's files.

By the beginning of 1935, NRA was anxious to get quick action on the three most flagrant cases of manipulation, and was willing to table all others temporarily, but the code authority did not want to turn the cases over to NRA for fear its action might displease the small druggists who enjoyed an indirect mark-up on these three products. The code authority requested a chance to see the manufacturers personally and tried to dissuade them from their manipulations. They succeeded in bringing one into line but the other manufacturers continued their methods.

In the spring of 1935 the number of free deals and discounts on small quantities increased. The weekly drug trade papers began publishing long lists of current deals for the benefit of small druggists. By that time NRA had taken the flagrant cases into its own hands but was frustrated in its attempts to dispose of them quickly by a ruling of the legal division requiring a complicated, formal procedure, and a hearing in each case.

NRA feared that the increasing number of free deals and discounts might jeopardize the drug trade's chance to retain its loss limitation provision if Congress extended NRA and the codes after June 16, 1935. The deals were rendering the manufacturer's wholesale list price on some products wholly fictitious. One of the most flagrant examples was a manufacturer who allowed the small druggist buying one dozen, another full dozen free. The little dealer selling this item at the code price received a mark-up of 100%. Another bad example involved the 10¢ sizes of some drug and cosmetic products. Although 10¢ was the highest possible selling price on these, it was also the minimum code price. The manufacturers had raised their wholesale list prices from 90¢ to $1.20 and, by means of special discounts, had permitted the small druggist to buy the products for about 87¢ per dozen through wholesalers. The code authority, however, could not realize what a powerful weapon such cases were in the hands of their opponents nor how difficult it would have been to uphold a provision based on an arbitrary and shifting base, unrelated to anyone's cost.

Meanwhile, the existence of manufacturers' dozen-lot deals was causing trouble in courts. In preparing one case for trial in the federal courts, NRA discovered that 9 out of the 15 items sold below the code price bore dozen lot deals. Realizing the danger of placing such a condition before the court, the officials eliminated these nine and brought the case only upon the remaining six items. Thus the loss limitation provision became practically unenforceable upon all products with fictitious manufacturer's wholesale list prices. In one case, the question of deals actually came before a court in New York City and the magistrate ruled that the code minimum price, in his opinion, was the net cost of the goods in dozen lots. In this case, the manufacturer had given one item free with a dozen and the court held that the code price per unit was the manufacturer's wholesale list price per dozen divided by thirteen instead of by twelve. The respondent, not having sold below that price, went free.

In April 1935, NRA decided that the number of deals offered the trade was so large and increasing so rapidly that the original plan of

handling them individually was impractical. It therefore decided to issue a blanket order to correct them all at once; and drafted such an order, in tentative form, for submission to the code authority. The order was designed to eliminate each product from the loss limitation provision automatically as soon as the manufacturer offered an objectionable deal and to reinstate the product automatically when the manufacturer rescinded the deal. This time the code authority was more friendly to the idea and agreed to consider it. They objected, however, that no druggist could keep track of whether a given product was in or out of grace; and suggested that, though the suspension of products should be automatic, the reinstatement should be done by separate NRA action in each case. The code authority also agreed that the order should apply to deals on quantities of less than two dozen, instead of one dozen, in order that all deals available to small druggists might be covered.

The order was drafted and redrafted several times during May, 1935 considerable difficulty arising in making it legally accurate. Before it could be approved, however, the Supreme Court's decision in the Schechter case brought an end to all code work.*

II. Clearance Sales

Article VIII, Section 2(a) of the Retail Trade Code permitted dealers to sell at less than the code price merchandise sold as a "bona fide" clearance, if advertised, marked and sold as such.** The provision was inherently difficult of administration and formed a convenient loophole for the price-cutter. The need for such a provision appeared first at the public hearing of August, 1935*** from the testimony of the cut-rate group, who stated that no merchant, unless he were a prophet, could escape errors in judgment in the operation of his business; and that the merchant's welfare depended on his right to clear his shelves of overstocked or slow-moving goods. Some of the proponents of the loss limitation provision believed that clearance sales were unnecessary in the drug business because of the steady, foreseeable demand for its standard goods; but most of those who held this belief were small merchants, thinking in terms of hand-to-mouth operations. Few of them could comprehend the problems of carload, or even gross-lot, buying.

The trouble with clearance sales lay in their abuse. It was easy for the cut-rater to overstock with the intention of cutting prices; or simply to cut prices, mark the goods as clearance merchandise, and defy the authorities to disprove his assertions that he was acting in good faith. The problem was not susceptible of a clear-cut solution, since any

---

(*) From a concise exposition of the problem of manipulation, see the memorandum from Assistant Deputy Mark Merrell to Division Administrator Harry C. Carr, 4/5/35; folder marked "Orders";- Deputy's files. For copies of the proposed stay order, see documents headed by a memorandum from Mark Merrell to legal adviser, G. B. Goldin, 5/13/35, same folder.

(**) This clause appears in full in Chapter III of this Part page 58

(***) See testimony of Q. F. Walker, pp. 260-270; M.M. Cohen 283-293; and M. Singer, pp 356-365.

restrictions practical enough to stop abuses inevitably reacted to the hardship of the merchant. The true test of a valid clearance sale was the good faith of the dealer conducting it, and the ways in which a sale might be conducted in good faith were too numerous and varied to admit of a universal definition. Each case, therefore, had to rest on its own merits. Where a law imposes a burden on one party to prove the mental state of another, it raises a difficult task. The code being a criminal law, the burden of proof of violation was on the Government, yet neither NRA nor the code authorities had any right under the law to examine the invoices, books, and papers of stores suspected of conducting illegal clearance sales. Without such objective information, the Government could not establish the subjective fact of good or bad faith.

An amendment requiring merchants to submit in advance to some administrative body full information concerning projected clearance sales might have prevented abuses; and such a regulation would have caused no hardship if the machinery set up was able to render prompt decisions. Such machinery existed in the nation-wide organization of local code authorities, but these bodies, consisting largely of competitors antagonistic to the price-cutters, were not proper repositories of the power. The NRA field offices could have supplies disinterested judges, but these offices lacked facilities for covering every city and town in the country.

In August, 1934 the Deputy drafted a proposed amendment attempting to define valid clearance sales, but the legal division promptly disapproved it.* On October 23, 1934, NRA held a public hearing on another proposed amendment requiring dealers to submit to their local code authorities, within 48 hours after the beginning of a clearance sale, full facts concerning the amount of goods on hand, the date they were purchased, and such other matters as the National Retail Drug Code Authority might, from time to time, prescribe. Only four speakers at this hearing discussed the proposed amendment in any substantial detail.** Only one of these*** was on the side of the proponents, and he, surprisingly, objected strongly to the amendment on the ground that it did not define a "bona fide clearance", nor designate who had power to rule upon the validity of a given sale. He also objected that a cut-rater could do much damage during the 48-hour leeway period. This witness

---

(*) See memorandum from N.T. Raymond, legal adviser to Mark Merrell, Assistant Deputy, 8/31/34; folder marked "Amendments"; Deputy's files.

(**) Other speakers concentrated on other amendments and questions up for discussion at this hearing.

(***) Samuel A. Weiss, executive-secretary, New York City local retail drug code authority, pp. 26-34, transcript of hearing on Retail Drug Code, October 23, 1934.

recommended that NRA outlaw all clearance sales except those upon damaged goods or manufacturers' discontinued lines. The other three speakers were on the side of the opponents, and two of them,* likewise to NRA's surprise, favored the proposed amendment. Questioning by NRA brought out the reason why the witness for the proponents objected to his own code authority's amendment, and why two witnesses on the other side favored it. Both of the cut-rate witnesses testified that in New York the local code authority had interpreted the term "bona fide clearance" to mean only discontinued lines of merchandise. The aforementioned witness for the proponents, who was secretary of the New York code authority, denied this, but when asked what he considered a "bona fide clearance", replied with a definition so strict that it actually covered little more than discontinued lines. Furthermore, he stated, his local code authority had to be "pretty ironclad to prevent subterfuges". It seemed probable that the New York code authority had overstepped its authority in restricting clearance sales, and this witness' objection to the proposed amendment was based on the realization that the amendment would disclose his code authority's lack of power.

The amendment received no further consideration after the hearing; and NRA instructed each local code authority to handle its own clearance sale cases. The only rules laid down were that the local code authority, wherever it suspected illegality in a clearance sale, was to notify the dealer involved and request him to submit facts bearing on his good faith. If he acceded to the request and the code authority decided that the sale was not bona fide, it was to submit all the facts to the NRA Regional Compliance Council for removal of the merchant's Blue Eagle, and for reference to a court. If the dealer refused to submit facts, the code authority was to try to get them itself.** A refusal to submit facts, would, naturally, be evidence of bad faith. This process was tedious and akin to closing the stable after the horse was gone; but NRA hoped that one or two Blue Eagle removals, or penalties inflicted by a court, might dissuade the cut-rate element from future abuses of the clearance privilege. It turned out that NRA was unduly optimistic, for no clearance sale case over reached a Compliance Council.

III. Premiums, Prize Contests and Outright Gifts

Article VIII, Section 2(c) of the Retail Trade Code provided that where a premium or certificate representing a share in a premium was given with any article, the base on which the minimum price of the

---

(*) Frances Kneitel, attorney for the National Independent Pharmacists, Inc., New York City, pp. 54-67 of the transcript; and M. Weissbard, cut-rate druggist, Newark, N.J., pp. 67-71. The Third, Irving C. Fox of the National Retail Dry Goods Association spoke mainly in general terms in favor of clearance sale privileges.

(**) See letter to Dr. E. F. Kelly from Mark Merrell, 2/28/35; "Explanations" folder, Deputy's files.

article was calculated should include the cost of the premium or share thereof.* This rule was definite, but sometimes difficult to apply. Authors of the code designed the premium clause originally to apply to the "cost plus 10%" provision but it continued to apply to drugs and cosmetics after these products came under the manufacturer's wholesale list price clause. Simplified examples will best describe the premium clause's operation.

If a retailer sold a suit of clothes costing him $15 net, the lowest price he could charge was $15 plus 10%, or $16.50. Clothing was subject to the Retail Trade loss limitation provision (cost plus 10%). If he offered to give with each suit a pair of suspenders costing him 50¢ the lowest price he could charge for the suit and suspenders was $17. If a retailer sold a jar of face cream with a manufacturer's wholesale list price of $12. per dozen, the lowest price he could charge per jar was $1, for face cream was subject to the drug loss limitation provision. If he gave away with each jar a mirror costing him 10¢ then the minimum price of face cream and mirror had to be $1.10.

In the above examples the premium was a piece of general merchandise, subject to the Retail Trade loss limitation provision and not a drug or cosmetic product. Suppose a dealer sold the same jar of face cream and offered to give away with it a box of cleansing tissues with a manufacturer's wholesale list price of $2 per dozen, or 16/2-3¢ per box. Suppose, also, that these tissues cost the retailer only 10¢ net per box. The premium clause taken alone would have required that only 10¢ be added to cover the cost of the tissues, but this would have violated the principle that no drug product should be sold below the manufacturer's wholesale list price per dozen. Therefore, NRA took the view that the cleansing tissue was not a gift, but the subject of a sale, since the customer could not get it without buying face cream. The drug loss limitation provision prohibited sales of cleansing tissues below the manufacturer's wholesale list price per dozen; so, in the example given, the lowest price the dealer could have charged for face cream and cleansing tissue was $1.17 ($1.00 for the cream and 16-2/3¢ for the tissues). Similarly, if a retailer gave the cleansing tissues with the purchase of the suit of clothes mentioned previously, the minimum price of both would have been the cost of the suit ($15.) plus 10% ($1.50) plus the manufacturer's wholesale list price of the cleansing tissue (16-2/3¢) a total of $16.67.

Even from the simplified examples set forth above, the reader can see how picayune on its face the procedure of handling premiums appeared. There was necessarily a lot of quibbling over a few pennies; and at one time NRA was the butt of a newspaper columist's jibes because of a ruling on a prize doll contest.** Nevertheless, the effectiveness of the loss limitation provision depended upon some control over premiums, and no one suggested a better clause for the purpose than the one in

---

(*) This clause appears in full in Chapter III of this Part page 104.

(**) Raymond Clapper's column; Washington Post. The exact date is forgotten but the article appeared early in 1935 to the best memory of the author. For details of the doll contest see letter from Mark Merrell to E.T. Clark 1/2/35; folder marked "Explanations"; Deputy's files.

the code. Without that clause, a cut-rate dealer could have evaded the spirit of the loss limitation provision by giving away premiums with every article sold at the code price. Ruthless price competition would have given way to equally ruthless competition in premiums, frustrating NRA's attempt to protect the small druggist. A few pennies difference in price may have seemed unimportant to the layman, but it was a serious thing to the druggist.

Straight premiums, unconnected with prize contests, were comparatively easy to handle. Trading stamps were a common variation of the premium, and the retailer using them had no difficulty in computing the amount to add to the code prices of articles with which he gave the stamps. Suppose the retailer gave a stamp with each 25¢ purchase and that 100 stamps entitled the customer to a watch costing the retailer 50¢. The value of each coupon was ½¢ and, to comply with the code, the retailer had to refrain from selling any article at less than its code price plus ½¢.

The most complicated and the most humorous instance of a straight premium problem involved the Owl Drug Company, a California drug chain. In May, 1935, NRA received a telegram from the Thrifty Drug Company, a prominent cut-rate firm of Los Angeles, complaining that an Owl competitor had employed a medium and was offering free psychic readings with each 50¢ purchase. Thrifty demanded permission to meet this intolerable competition. It turned out that Thrifty was right; one of the Owl Drug stores had hired a spiritualist and put her in a booth in the store where she told the fortune of all who purchased 50¢ or a dollar's worth of merchandise. Some of the articles sold in the store were priced at the code minimum; and if the store sold a customer one of these items and gave him a psychic reading too it violated the code.

When the local code authority complained of the practice, the Owl store made each customer pay one cent extra for his psychic reading. Later, Owl abandoned the scheme, the furore raised by it being more than it was worth.*

Two clauses regulated the holding of contests, one an amendment to the code and the other the premium clause already mentioned. The amendment prohibited lotteries or other schemes involving the laws of chance. It permitted retailers, however, to hold prize contests, provided the winner was chosen by competent and disinterested judges solely on the basis of merit. In addition, the rules of the contest had to be clearly defined and strictly adhered to and employees of the store excluded

---

(*) The record of this incident appears in the folder marked "Complaints", Deputy's files, clipped to a letter from George M. Gales, President of Liggett Drug Co. to Mark Merrell, Assistant Deputy, dated 5/24/35.

from the competition. (*)

The only trouble with this amendment was that the average retailer thought it contained all the rules he needed in conducting a prize contest. He forgot that Article VIII, Section 2 (c) required the cost of premiums to be added to the prices of the articles sold, or else he failed to realize that contest awards were premiums. This trouble would not have arisen had the prize contest amendment contained a short sentence referring the reader to the premium clause for further restrictions on the holding of contests. (**) The premium aspect of a prize contest lay in the requirement of retailers that customers make a purchase in order to obtain an entry blank. Few stores gave away entry blanks absolutely free, and any gift made contingent on the purchase of something else, was a premium under the code.

Though prize contests differed widely in their details, only three basic types appeared during the code period. These might be termed the slogan or essay type, the voting type, and the auction type. The slogan or essay type, as its name implies, involved the writing of slogans or essays, usually on the merits of the store or some product. The best slogan or essay, in the opinion of the judges, won the prize. In the voting type, the store allowed a certain number of votes per amount spent, and the person holding the greatest number at the close of the contest won the prize. In some cases, the customer's votes inured to his own benefit, turning the affair into an individual buying battle. In other cases, customers were required to cast their votes for the most popular man or woman, boy or girl, or church in the town; and the prize went to the successful candidate. (***) In the auction type of contest, the store gave with each purchase a certain number of certificates entitled "bucks", and on a certain day held an auction of assorted

---

(*) Amendment No. 5 to the Retail Trade Code, approved 9/21/34; Code Record files.

(**) See the following letters in the folder marked "Explanations"; Deputy's files. In each of these cases the Assistant Deputy had to explain that, though a given prize contest complied with Amendment No. 5, it violated the premium clause, Article VIII, Section 2 (c):-
Mark Merrell to Charleston, S. C., NRA Office, 11/1/34
" " to Dr. E. F. Kelly, 11/27/34
" " to Edw. V. Sheely, Memphis, Tenn., Code Auth. 11/1/34
" " to Sam Weiss, N.Y.C., Code Auth. 4/4/35
" " to Jacksonville, Fla., NRA office, 2/25/35
" " to Philadelphia, Penn. NRA office 4/8/35
" " to E. T. Clark, United Drug Co., 1/2/35

(***) For cases involving votes, see the following letters in the folder marked "Explanation"; Deputy's files
Mark Merrell to Charleston, NRA office, 11/1/34
" " to Edw. V. Sheeley, 11/1/34
" " to Sam Weiss, 4/4/35
" " to Jacksonville, NRA office, 2/25/35
" " to Philadelphia NRA office, 4/8/35
" " to E. T. Clark, 1/2/35

prize merchandise. Customers bid on goods in the usual way, but paid for them with "bucks" instead of money. (*)

NRA had to handle the computation of costs in prize contests a little differently than in premium cases. The application of the code to straight premiums resulted in the customer paying at least the cost of everything he received, but the same rule, if applied strictly to prize contests, would have forced a storekeeper to charge a hundred and one dollars for a dollar bottle of hair tonic simply because the purchaser might win a hundred dollars in an essay contest. Consequently, NRA compromised and ruled that not the prize, but the chance to win it was the true premium. Hence, where the cost of the prizes to the retailer totaled $100, and he issued 10,000 votes, the cost of each vote was one cent. In order not to violate the code, the retailer had to add one cent per vote to the code minimum price of each article sold. Usually the retailer could not foretell how many entry blanks, votes or "bucks" he would issue; so NRA allowed him to estimate this figure.

Difficulties arose when merchants claimed their premium merchandise had cost them nothing, and NRA scrutinized such claims closely. If the merchant had really obtained the articles free, and if they were articles of general merchandise, he could use them as premiums without restriction; but if the goods were drug or cosmetic products, he had to charge the manufacturer's wholesale list price for them, since that code minimum applied regardless of cost. Sometimes close analysis showed that free goods had a hidden cost. In one case, manufacturers had given the goods to the dealer on condition that he advertise them in handbills. There the cost of the goods to the merchant was the cost of the handbill advertising. (**)

Outright gifts raised an interesting problem related to premiums. One retailer to the annoyance of his competitors, offered absolutely free to the first 500 women entering his store on a certain date, a box of cleansing tissues. (***)

(*) For a case involving "acution bucks" see a memo from Assistant Deputy Merrell to Legal Adviser Goldin, 11/6/34; folder marked "Katz Drug Co." Deputy's files.

(**) See sheaf of correspondence headed by a letter from Assistant Deputy Merrell to Samuel Weiss, 4/4/35; folder marked "Explanations"; Deputy's files. For a detailed exposition of the rulings of Assistant Deputy on the whole question of premiums and prize contests, see a memorandum from Assistant Deputy Merrell to Cleveland NRA office, 12/3/34, same folder.

(***) See a sheaf of correspondence headed by a letter from Assistant Deputy Merrell to Chicago NRA office, 9/26/34, folder marked "Explanations"; Deputy's files.

Wherever the store attached no strings to such an offer, other than that the customer come and ask for the goods, NRA uniformly rules the practice to be outside the jurisdiction of the code. This ruling applied whether the gifts were of general merchandise or drug products, for the loss limitation provisions applicable to each of these classes of merchandise applied only to sales, and made no mention of gifts. NRA regarded a man's right to give away his property as something outside the scope of a commercial law. This view left an opening for what might have harmed the small dealer more than loss leader selling. But loss leader giving never gained much headway, probably because of its expense.

IV DISCONTINUED LINES OF MERCHANDISE

Article VIII, Section 2 (a) of the Code, in addition to permitting clearence sales, allowed dealers to sell bona fide discontinued lines of merchandise below the code price, if advertised, marked and sold as discontinued.

In November, 1934, the Code Authority reported that a druggist in Massachusetts was selling a certain brand of shaving cream below the code price and marking it a discontinued line; and that the manufacturer had telegraphed that the cream was still in production, and asked the Code Authority to stop the druggist from marking it discontinued.

In this case, NRA ruled that the term "discontinued line", meant a line discontinued by the manufacturer, and not a line discontinued merely by the retailer. The druggist did not object to the ruling and the case was closed. (*)

In January, 1935, the Oklahoma City NRA office wrote Washington that a druggist was advertising a certain rouge as a discontinued line, and that the resident attorney for the manufacturer had objected to the advertising on the ground that production of the rouge was not discontinued. NRA might have issued the same ruling as in the retail trade and the retail drug trade over the meaning of the term "discontinued line". The National Retail Drug Code Authority contended that, in the drug industry, a "discontinued line" meant but one thing, namely, that the manufacturer had stopped producing the item. Had the discontinued line provision of the code applied to the drug trade alone, NRA might have accepted this meaning; but the provision was shared by the drug trade and the general retail trade. In the general retail trade, the term "discontinued line" meant either that the producer had discontinued the line or that the retailers no longer expected to stock it. The result was that the general retail trade's definition being the broader, prevailed; and, notwithstanding manufacturers' objections,

---

(*) See sheaf of correspondence attached to a telegram from the J. B. Williams Company to the National Retail Drug Code Authority, 11/26/34; folder marked "Explanations"; Deputy's files.

drug stores could advertise products still in production as discontinued. (*)

In neither of the two cases mentioned was there a question of the retailer's right to sell the item below the code price; for if he intended in good faith never to restock the goods he had a right to hold a clearance sale whether or not the manufacturer had discontinued the line.

Occasionally, a question arose as to whether a manufacturer had actually discontinued producing a certain item. In the drug industry, some cosmetic manufacturers customarily changed their package design each year without changing the product itself, and then cut-rate druggists asked NRA if they could sell the old package below the code price. The package style of cosmetic products tended to be as important to the consumer as the body style of automobiles, and customers would not pay the same price for the old style as for the new. Cut-rate druggists complained that unless they could sell their stock of last year's packages below the code price, they could not get rid of it.

NRA ruled in these instances that whether or not a line was discontinued depended on how appreciable a change the manufacturer had made in the package, and how widely he had advertised this change to the public. If the change were so great and so well advertised that the average customer would notice it, not by a side-by-side comparison of the two styles, but by observation of the new package alone, then the line was discontinued. If, however, the change were slight and attracted no notice, the line was not discontinued.

V COMPLETE FINAL LIQUIDATIONS

Article VIII, Section 2 (a) of the code, in addition to its other provisions, permitted a dealer to cut below the code price on "merchandise sold upon the complete final liquidation of any business". Because of the words "any business", the clause technically embraced merchandise bought by a merchant at a bankruptcy sale of some store other than his own. The purpose of the clause was merely to allow a merchant to liquidate his own business but it exceeded its scope. So far as the records show, no price cutter ever utilized this loophole, and the presumption is that none ever discovered it.

Two cases of complete final liquidation came before NRA for a ruling. In one, a druggist intended to liquidate his store and immediately open another across the street. Whether this was a complete final liquidation under the code was doubtful, but there was at least room for valid clearance sales of some items. The merchant had a right to move his shop, and on such an occasion the clearing of dead stocks might have been necessary. Therefore, NRA referred the case to its field office for a

---

(*) The documents on the rouge case are in a sheaf of correspondence headed by a letter from Assistant Deputy Merrell to the Oklahoma City NRA office, 5/6/35; folder marked "Interpretations"; Deputy's files.

closer examination of the facts. (*) In the other case, a druggist owned two stores and intended to close one of them. He wished permission to sell all the stock of the liquidating store below the code price. NRA ruled that this was not a complete final liquidation of the business as required by the code, but a liquidation of only part of the business. Hence, the druggist could not sell the whole stock below the code price, but might have held clearence sales of parts of the stock if such sales were necessary to the effective liquidation of the store.(**)

(*) This case is in a sheaf of correspondence headed by a letter from the Buffalo NRA office to John Swope, 10/26/34; folder marked "Explanations"; Deputy's files.

(**) The papers in this case are in a sheaf headed by a letter from Assistant Deputy Merrell to Dr. E. F. Kelly, National Retail Drug Code Authority, 1/15/35: folder marked "Rulings"; Deputy's files.

VI. Determination of the Code Price in Unusual Cases

Pharmaceutical manufacturers differed in their pricing practices from manufacturers of package medicines and cosmetics in that they usually quoted a "trade list price" with discounts instead of a manufacturer's wholesale list price per dozen. Their trade list price, if comparable to anything, was like the top retail price of the cosmetic and package medicine manufacturers. Pharmaceutical manufacturers allowed the wholesaler certain discounts from the trade list price and expected the wholesaler, in turn, to pass on certain parts of these discounts to the retailer. One company allowed 40% discount from its trade list to anyone who purchased $300 worth in a year, and 25% discount on smaller quantities bought through the wholesaler. Viosterol, a pharmaceutical product usually sold to small dealers at 15% off the trade list price, regardless of the quantity bought.

Applying the principle of the drug loss limitation provision and disregarding its wording, the code price on these pharmaceutical products should have been the trade list price less the discount available in dozen lots, for this was the cost to the small druggist. The code price on the products of the company mentioned above would have been the trade list price less 25%; and the code price of viosterol would have been the trade list less 15%. However, the loss limitation provision did not mention any trade list price, but only the manufacturer's wholesale list price per dozen.

Under the March amendment, NRA might have treated the trade list price as the manufacturer's wholesale list price for code purposes, for the "last proviso" of this amendment required the deduction of dozen-lot discounts, and the resulting code price would have equalled the small dealer's cost. Under the September amendment, however, discounts were not deductible in determining the code price; and if NRA had treated the trade list price on pharmaceuticals as the manufacturer's wholesale list price, the code price would have been higher than the small druggist's cost. NRA was unable to formulate a ruling on this problem up to the expiration date of the code; but present analysis indicates that, since pharmaceutical products had no manufacturer's wholesale list price, NRA should have ruled them out of the loss limitation provision altogether.

The fact that most pharmaceutical products were sold on doctor's prescription, and hence were not subject to price cutting prevented this problem from being serious. Many pharmaceutical manufacturers also made specialties to be sold directly to the public or to be prescribed as a complete remedy without other ingredients. These were more adaptable to price cutting than straight pharmaceutical products, but most of these manufacturers priced their specialties in the same manner as cosmetics and package medicines. The specialties had manufacturer's wholesale list prices per dozen, and these raised no problem. *

(*) For an exposition of the problem of pharmaceutical prices, see a letter from Sam Weiss, New York City Code Authority to Dr. E. F. Wells, National Retail Drug Code Authority, 10/29/34; folder marked "Local Retail Drug Code Authorities"; Deputy's files.

One manufacturer of a package medicine quoted no wholesale list price per dozen, and did not suggest any resale price to wholesalers, thus raising a unique problem in the determination of the code price. This manufacturer sold only in gross lots and $120 per gross was the only price he would quote. Wholesalers sold this article to retailers usually at $12.00 per dozen, and hence the Red Rock Price List showed $12.00 as the manufacturer's wholesale list price per dozen. Actually, since the manufacturer quoted only one price of $120. per gross, the Code Authority eventually had to rule that the code minimum was the gross price divided by 12, or $10. per dozen. This was below the cost of these goods to the small dealer.

VII. Manufacturers' Price Changes

Local code authorities encountered difficulty in their work of notifying the trade of manufacturers' price changes, in a number of cases, from the manufacturers' failure to give publicity to the changes. Drug manufacturers had power to fix the minimum price under the Retail Drug Code yet they were under no obligation to report price changes to the retail drug code authorities. (*)

The Codes of Fair Competition for the Package Medicien Industry and the Perfume, Cosmetic and Other Toilet Preparations Industry together covered all drug manufacturers except those making pharmacentical products, and these codes each had a provision requiring the manufacturers to file their prices with their own code authorities. However, these code authorities could not issue a manufacturer's price to any one except a distributor of the class eligible to buy at that price, and the retail drug code authorities could not qualify. In the spring of 1935, the package medicine and cosmetic manufacturers decided to amend their codes to make open prices available to any interested person;(**) but the codes expired before these amendments materialized.

(*) See sheaf of correspondence headed by letter from Assistant Deputy Herrell to Sam Weiss, New York City Code Authority, 11/10/34, folder marked "Local Retail Drug Code Authorities," Deputy's file.

(**) See Code Record files on these two manufacturing codes.

VIII. RETAILERS' PRICE ADVERTISING

The loss limitation provision did not prohibit advertising but only selling at a price below the code minimum. Therefore, acceptable proof of a price violation required that witnesses purchase the suspected productand make affidavits covering the facts of the sale. Evidence of violations thus was more troublesome and expensive to secure than it would have been had an advertisement been sufficient proof. However, if the Code Code Authority had requested an amendment to correct this condition it would have required a public hearing, and the whole loss limitation provision might have been opened to attack by its opponents.

IX. FEDERAL AND STATE TAXES

As stated in Section IV of this Chapter, NRA issued an interpretation of the September amendment on April 5, 1935, but omitted therefrom all reference to the effect of taxes on the code price. The tax question was vexatious, since, if a cut-rater absorbed a tax in selling to the public, he achieved a substantial price advantage over small druggists. Taxes affecting the code price were of two types,the Federal manufacturers' excise tax, and state or city sales taxes. The vast majority of manufacturers absorbed the Federal excise tax, so that it was part of their manufacturer's wholesale list price perdozen, but a few sold on the basis of list price plus tax. State and city sales tax laws often contained clauses stating that the tax was upon consumers and not upon retailers, and that the retailer should not absorb it. Small retailers, not wanting any additional expense on their own shoulders, were willing to pass the tax onto the consumer by selling at the code minimum price plus the tax, but cut-raters, thwarted the small druggists' desires by selling at the flat code minimum and absorbing the tax.

Months of negotiations between The Deputy's Office and the Legal Division, resulted in the latter approving two interpretations on Federal taxes and two on state and city taxes. On their way to the Division Administrator for signature, however, they were disapproved by the Review Division.*

One of the Federal Tax interpretations provided that if a manufacturer absorbed the tax, it became part of his wholesale list price per dozen, and not deductible in computing the code minimum price. The Review Division did not object to this, but its disapproval of the others rendered this one valueless. The other Federal tax interpretation stated that if the manufacturer did not absorb the tax, and sold his product on the basis of his list price plus the tax, the retailer had to include the tax

---

(*) A body of lawyers who gave all formal orders a final checking as to form and substance. For full documentation on the matter herein, see docket on Order 60-397. Code Record files.

in the code price. The review Division contended that the wording of the loss limitation provision did not support this rule, and that the rule conflicted with the principle that the manufacturer's wholesale list price was the code price regardless of the cost of the goods. The Review Division's view placed the code price below the small dealer's cost wherever the manufacturer failed to absorb his excise tax.

The two interpretations on state and city sales taxes provided that, if the tax law did not require the retailer to pass the tax on to the consumer, he could absorb it and sell at the manufacturer's wholesale list price without adding the tax. But, if the tax law ordered the retailer to pass the tax on to the consumer, the retailer could not sell an item below the code price plus the tax without violating either the code or the tax law; and, since NRA could not presume that the dealer would violate the law, it would presume he was violating the code. The Review Division disapproved both of these interpretations on the ground that NRA had no jurisdiction to enforce state or city sales tax laws.

As a result of the Review Division's action, the administrative Officials deleted the tax matters from the list of interpretations and requested approval of the remainder, as stated in Chapter IV of this Part.

X. DIFFICULTIES INHERENT IN CODE AUTHORITY ADMINISTRATION

Administration of the code by trade groups, in the form of code authorities, was responsible for some of NRA's difficulties in handling the problems of the loss limitation provision. The National Retail Drug Code Authority performed well its function of advising NRA on the problems and desires of the trade, but, through lack of a legal adviser, was unable to take from NRA much of the burden of answering questions from trade members concerning the code. In its work of coordinating and supervising the local code authorities, the National Code Authority encountered difficulty because of the large number and wide geographical dispersion of the locals and the lack of intermediate coordinating bodies such as state code authorities. The National Code Authority had little to do with compliance cases, except to assign a representative to sit in at Blue Eagle removal hearings in Washington, and the decentralization of these hearings into nine regional areas, in December, 1934, eliminated the necessity of most of this work.

The members of the National Retail Drug Code Authority were: John Goode, Chairman, and John Dargavel, both representing the NARD; Dr E. F. Kelly, secretary, representing the APhA; George M Gales, representing the National Association of Chain Drug Stores; and Wheeler Sammons, representing the Drug Institute of America. Local retail drug code authorities had the job of securing compliance with the code in the field, and for this purpose the code established them on a basis of congressional districts and metropolitan areas throughout the entire country. With almost phenomenal spped, after the approval of the code in October, 1933 the National Code Authority set up 539 local bodies, but almost as phenomenally, the number of them in active existence declined until November 1934, a survey for budget purposes revealed that all but 156 had disbanded. Probably the remaining groups covered all the areas where price competition was heavy enoughtto raise a problem of policing.

Both the National Retail Drug Code Authority and, with a few exceptions, its local code authorities were composed of representatives of small druggists and chains, with no cut-rate members. Most of the members of the National body had a sufficiently broad viewpoint to be impartial in their dealings with price cutters, but many of the local bodies found it difficult to overcome their inherent hatred of all cutraters, and their impartiality in handling cases suffered as a result. Furthermore, the members of local code authorities usually lacked the legal training necessary to the adequate handling of compliance cases. Some of them were zealous in their desire to keep their areas in strict compliance, and they demanded of NRA instant prosecution for any cut-rater who sold even one item below the code price; but they failed in a number of instances to collect adequate evidence for a conviction, and became impatient when NRA sent the cases back for more data.

In order that no one might raise the charge of persecution, NRA demanded that each code authority attempt amicable adjustments of all cases, and refer to NRA for prosecution only cases of flagrant and wilful violators. In addition, officials handling the Retail Drug Code asked that each case referred to NRA under the loss limitation provision contain evidence of at least half a dozen violations spread over a period of about two weeks, so that the record would rebut the defense that the low price was a mere mistake. Some of the local code authority officials felt this rule to be foolish red tape, and one of them, wrote that a law was either a law or it was not a law; and that if he murdered someone he didn't have to do it six times over a course of two weeks to be hanged for it.*

Because of this impatience and lack of legal understanding, local code authorities lost cases that they should have won, and delayed many that should have taken little time to complete. Furthermore, by their attitude of prejudice against price cutters, some local bodies antagonized these stores and lost the chance of securing compliance by friendly agreement. A number of price cutters in several cities raised the cry of persecution, charging that local code authorities ignored violations of small uptown druggists and concentrated on those of their old enemies.** Such bad feeling was not conducive to the best administration of the loss limitation provision, and raised a serious question whether efficiency and justice sanctioned the administration of price control devices by trade groups.

XI COMPLIANCE AND LITIGATION

A. FOREWORD

Compliance was a major problem under the Drug Code, principally because of a few flagrant violators of the loss limitation provision who contended the code was unconstitutional. The vast majority

---

(*) See correspondence with E. G. Morrison, Sec., local retail drug code authority, Santa Paula, Calif.; folder marked "E. G. Morrison." Deputy's files.

(**) See "Issues seen by Opponents," Chapter V of this Part; 102.

of the trade, including a number of former price cutters, were willing to abide, and gave slight trouble. The few who openly flouted the code were big firms doing large volumes of business and able to hire attorneys to represent their views.

Litigation was a slow process and, even when the courts acted they often decided against NRA; hence the loss limitation provision was on its way toward a breakdown from lack of enforcement when the Schachter decision reached.

In December, 1934, when the slowness of litigation was just becoming apparent, the National Retail Drug Code Authority suggested that NRA amend the codes covering drug manufacturers so as to prohibit those manufacturers from selling goods to any drug retailer whose Blue Eagle had been removed for violation of the Retail Drug Code. Such a legalized boycott, the Code Authority believed, would render court enforcement of the loss limitation provision unnecessary. N.R.A. referred the matter to the manufacturers' code authorities, and the code authority for the cosmetic industry assented, but asked in return that the druggists amend their code to prohibit any drug store from buying goods of a manufacturer whose Blue Eagle had been removed for violation of the Cosmetic Code. This the National Retail Drug Code Authority agreed to do.

The Package Medicine code authority was not so quick to agree to the boycott plan, but the Retail Drug Code Authority finally persuaded them to do so. The Schechter decision intervened before any of these amendments was approved.*

In addition to the obvious cause of compliance trouble, namely, the lack of quick court action favorable to NRA, there were several minor contributing causes. In February, 1935, the National Retail Drug Code Authority wrote NRA urging that the obsolete Code Eagle, labelled plainly with the year 1934, be replaced with a 1935 insignia. The Code Authority alleged that the outdated eagle was not an effective instrument of compliance, was not taken seriously by either merchant or consumer, and was no loss to the dealer when removed.** NRA did not follow the suggestion.

In December 1934, NRA decentralized its compliance machinery. Previously, though there was a field office in each state, all cases of Blue Eagle removal came to Washington. Though this arrangement formed a bottleneck, it had the advantage of giving the Deputy Administrator of each code an opportunity to review his cases prior to hearing

---

(*) For correspondence on this scheme, see the following letters in the Deputy's files:

From	To	Date	Folder
Nat.Retail Drug Code Authority	H.C.Carr NRA	2/7/35	Insig. & Labels
Ditto	Ditto	1/11/35	Code Auth.
Wheeler Simmons	Ditto	1/18/35	Insig.&Labels
N.J.Pharm.Assn	Merrell NRA	1/30/35	Gen. Corres

(**) See letter from Code Authority to Division Administrator Harry C Carr 2/7/35; folder marked "Insignia and Labels", Deputy files.

and to aid the prosecuting attorney throughout the procedings. After December, 1934, compliance cases for Blue Eagle removal went to nine Regional Compliance Councils, scattered strategically throughout the country, each one covering a number of states. Though this broke the bottle-neck, it left the Deputy Administrator with no control over compliance cases under his code.

Cases involving labor provision and standard trade practice provisions were susceptible of effective handling by the decentralized machinery; but cases involving wholly new legal principles need uniformity of interpretation and presentation, achievable only by centralized handling. Without this uniformity these new principles had no fair chance to establish themselves as permanent parts of the law. To achieve partial uniformity of handling, the Compliance Division of NRA allowed the Deputy to review digests of cases on the drug loss limitation provision before the cases were brought to hearing. The Deputy could submit suggestions to the Regional Attorney, and thus correct major errors; but he could not be sure that the attorney thoroughly understood the workings of the loss limitation provision. The loss of personal contact between attorney and Deputy may have lessened the effectiveness of the attorneys' work.*

A statistical agency employed by the National Retail Drug Code Authority suggested another possible cause of compliance trouble, namely, the numerous public statements of high NRA officials and the numerous NRA policy orders issued against price fixing. The statistical agency alleged that these statements and policy orders made the loss limitation provision seem to be on trial, and made cut-raters feel that they would not be prosecuted for violating it. The statistical agency backed up its allegations with figures showing increases in the number of violations in certain areas during periods immediately following the issuance of a statement or policy against price fixing.**

Even if there had been no practical difficulties in securing compliance and even if the Supreme Court had decided differently at least one person in NRA feared a possible breakdown of the loss limitation provision of the Retail Drug Code on Legal grounds. This person was the Legal Adviser on the code, who, after careful study, wrote the Assistant

---

(*) See Memorandum from Division Administrator Harry C. Carr to D. H. Nelson, Code Administrator Director, 1/18/35; folder marked "Memoranda," Deputy's files.

(**) See letter from Merchandising Facts, Inc., New York City, to George M. Gales, member of the National Retail Drug Code Authority, 1/7/35. This letter is attached to a memorandum from the Assistant Deputy Administrator to the Deputy stating that Mr. Gales had intended to use this letter in speaking at the NRA General Price Hearing of January 9, 1935, but at the last minute did not do so. Folder marked "Hearings"; Deputy's files.

[illegible] Administrator in February 1935, that for some time he had doubted the validity of the loss limitation clause for seven reasons: First because it made the manufacturer's wholesale list price per dozen the fixed minimum; second, because the manufacturer's wholesale list price was not a precise standard determinable by the application of strict rules; third, because it was not a standard used generally throughout the whole trade; Fourth, because it apparently bore no definite relation to cost and hence became somewhat arbitrary; fifth because it did not apply in general to all or nearly all drug items because there were a large number which had no manufacturer's wholesale list price per dozen; sixth, because it might vary from time to time and there were no definite channels through which a retailer might be informed of this with reasonable promptitude; and seventh, because the standard, in general, was too"indefinite, uncertain and elusive".*

B. OUTSTANDING LITIGATION CASES

The following brief digests of outstanding litigation cases show the difficulties encountered in attempting to enforce the loss limitation provision in the courts. Questions of state and Federal jurisdiction, questions of inter and intrastate commerce, and difficulties of holding competitors in line during litigation appear in these cases.

1. THE STANDARD DRUG CO., RICHMOND, VA.

The Standard Drug Co., operating three cut-rate drug stores, in Richmond, Va., announced in July, 1934, that it would sell below the code minimum price of the Retail Drug Code, and comply only with the labor provisions. The local code authority endeavored to adjust the matter, but without success.

The NRA Compliance Council in Washington held a hearing on September 4, 1934; heard the evidence and voted to remove the respondent's Blue Eagle and to refer the case to the Litigation Division. The Eagle removal was a gesture, for the Standard Drug Co., was not displaying a Blue Eagle and did not even send a representative to the hearing. The NRA Litigation Division seeing no evidence of interstate commerce in the case,**referred it to the Virginia State NRA Director to bring proceedings under the Virginia State Recovery Act; and on October 10, 1934, the Commonwealth Attorney filed a bill in the Law and Equity Court of Richmond requesting an injunction. The parties argued the case before Judge Pollard, who ruled on November 15, 1934, that the Virginia Recovery Act, the National Industrial Recovery Act, the Retail Drug Code and the loss limitation provision were all constitutional. On the same day, however, a decision of the Virginia Supreme Court on the State milk control law cast doubt on the correctness of Judge Pollard's ruling, and he refused to grant an

---

(*) See memorandum from G. B. Goldin to Mark Merrell, 2/19/35; folder marked "Memoranda"; Deputy's files.

(**) The Standard Drug Co. advertised that it would not fill mail orders.

injunction, Judge Pollard had based his decision on the opinion of the United States Supreme Court in the New York milk case and the Virginia Supreme Court had said that decision did not apply in Virginia. The refusal to issue the injunction enabled the Standard Drug Co. to cut prices without restraint; so on December 10, 1934, a delegation from the Richmond code authority visited NRA and asked for a blanket exemption permitting all the druggists in Richmond to sell beneath the code price to meet this competition. NRA was unwilling to grant such an exemption because of the precedent it would set and persuaded the Richmond delegation to withdraw their petition temporarily. There was still hope for an injunction, for the Richmond Code authority said that Judge Pollard would grant one if the loser in the milk case petitioned the Supreme Court of Virginia for a rehearing. On December 15th, the loser filed his petition, but Judge Pollard then stated that he would issue the injunction only if the Supreme Court granted the rehearing. The Richmond druggists became discouraged again, but NRA once more persuaded them to withhold their petition for exemption. Meanwhile the Federal Trade Commission sent an investigator to Richmond, but he found no evidence of interstate commerce; so the Commission dropped the matter.

About the last of January, 1935, the Virginia Supreme Court granted a rehearing in the milk case; and on February 5, 1935, Judge Pollar issued the long-awaited injunction; he suspended the injunction until February 25th to give Standard a chance to appeal. Since it was obvious that Standard would appeal, and that the Supreme Court would further stay the injunction, the Richmond, code authority resubmitted its request for an exemption on Februaryllth, demanding that NRA grant it by noon of the following day, or accept the resignation of every member of the local code authority. NRA still felt such an exemption undesirable; so it denied the petition, and the code authority resigned. The Richmond druggists, especially the chain stores, immediately cut their prices to meet or beat those of Standard; and a price war ensued.

The NRA Litigation Division then decided to proceed against Standard in the Federal Court, and on March 22, 1935, filed a bill in equity before Judge Way, sitting at Norfolk. Standard moved to dismiss the bill, but the court denied the motion. However, the court refused to hear the case until the United States Supreme Court had rendered its decision in the Schecter case.*

2. WEISSBARD BROS., NEWARK, N.J.

Weissbard Bros., a cut-rate firm of three stores in Newark, N.J., commenced cutting regularly below the code price in December, 1934. At that time, New Jersey had a state NRA law and its own state retail drug code authority. This code authority promptly prevailed upon the state's attorney to file a bill in equity in a state court asking for an

---

(*) References for this history of the Standard Drug Co. Case:-Litigation Division files; Compliance Division files; memorandum from Division Administrator Carr to L. C. Marshall, 3/22/35. folder marked "Memoranda" Deputy's files. See also folders marked "Standard Drug Co". Deputy's files.

injunction. Meanwhile, Weissbard, anticipating that the code authority might try to interfere with his cut-price selling, filed a bill before Judge Fake in the Federal District Court, asking for an injunction to require the code authority and the U. S. District Attorney to let Weissbard's business alone. The state code authority requested NRA on December 17, 1934, to remove Weissbard's Blue Eagle; but NRA refused because the case was already under the jurisdiction of a Federal Court. However, NRA promised to ask the U. S. District Attorney to file a cross-bill in Judge Fake's court asking for an injunction against Weissbard; and, in order to prevent other Newark stores from violating the code, NRA sent telegrams to the larger ones pointing out that court action against Weissbard was preceeding as fast as possible, and telling them that if they met Weissbard's competition, NRA would take action against them also. The U.S. District Attorney thought it unwise to take offensive action in Judge Fake's court, and believed it would be better to concentrate the attack in the state court. When Weissbard's case against the Government came up for hearing on December 24th, the District Attorney had it postponed until January 7, 1935.

Before this hearing occurred, and before any action could be obtained from the state court, the acting governor of New Jersey issued a proclamation repealing the state NRA act. This move made further suit in the state court useless, and left NRA no choice but to shift its attack to the Federal tribunal. When the case of Weissbard against the code authority came up for hearing on January 7, the District Attorney postponed it until January 14th, and then postponed again until January 28th. His reason for both postponements was that NRA was holding certain Price Hearings on January 9th and might, as a result, cancel price fixing from all codes. NRA finally convinced the Department of Justice that it should not delay code cases because of uncertainty of NRA policy. On January 28th, Judge Fake waived the oral argument and asked the parties to file briefs. Meanwhile, some of the druggists in Newark had begun to meet Weissbard's prices. George M. Gales, President of the Liggett Drug Co., and a member of the National Retail Drug Code Authority used his influence on the chains and temporarily eased the situation; and NRA helped by removing the Eagle of one firm, Wolf Bros., on March 5, 1935.

While Judge Fake was reserving decision in Weissbard's case against the Government, the District attorney, on March 5, 1935, filed a criminal case against Weissbard in the same court. Weissbard filed a plan of not guilty, but later withdrew it and, on April 9th, filed a demurrer and a motion to quash the case. Judge Fake, on April 16th, sustained the demurrer and dismissed the suit on the ground that the NIRA was unconstitutional, and that the transactions in the case did not affect interstate commerce. The drug stores in Newark started to meet Weissbard's prices immediately, and Mr. Gales, because the Liggett stores had to join the rest to save their business, resigned from the National Retail Drug Code Authority. (*)

(*) References for this history of the Weissbard Bros. case; Litigation Division files; and memorandum from Division Administrator Carr to L. C. Marshall, 3/22/35, folder marked "Memoranda", Deputy's files. See also folders marked "Weissbard", Deputy's Files

3. THE JOHNSON WHOLESALE PERFUME COMPANY (ALLEN CUT RATE STORES) MASSACHUSETTS, RHODE ISLAND AND CONNECTICUT.

The Johnson Wholesale Perfume Co., Inc., New Haven, Connecticut operated a chain of cosmetic and drug shops throughout Massachusetts; Rhode Island and Connecticut under the name "Allen Cut Rate Stores". The first complaint of price cutting against this firm came from a competitior on April 9, 1934. After much negotiation, the case went to the Retional NRA office in Boston, and on February 12th, the Compliance Council voted to remove Johnson's Blue Eagle and to refer the case to the Litigation Division. The case had elements of interstate commerce in that theJohnson Wholesale Perfume Co. transported merchandise in its own trucksfrom its own warehouse to its retail stores, across state lines; and there was some evidence that the merchandise was shipped in its original packages. On March 23, 1935, the Litigation Division filed a bill in equity in the Rhode Island Federal District Court, but took no further action in that suit. On March 14, 1935, it filed a bill in equity in the Connecticut Federal District Court, and the respondent appeared and filed a motion to dismiss. On May 11th the parties argued before the court upon this motion and the court reserved decision, but the ruling of the Supreme Court in the Schecter case put an end to this suit. While the case was pending, the Allen Cut Rate Stores were vigorously cutting prices below the code minimum throughout New England to the discomfort of those druggists who sought to follow the code. Another New England Chain of cosmetic shops, the Carroll Co, petitioned NRA for an exemption from the loss limitation provision so it could not meet the Allen Stores prices, but NRA, in accordance with its policy, denied this request.*

4. THE THRIFTY DRUG COMPANY, LOS ANGELES.

The Thrifty Drug Company, a firm owning about 5 cut-rates drug stores in Los Angeles, commenced cutting prices below the loss limitation provision of the code in the spring of 1934. The local code authority for Los Angeles gathered evidence of 70 price cuts and submitted it to the U. S. District Attorney, and the case went to the Federal Grand Jury. About that time,Thrifty retained the law firm of McAdoo and Neblett. Shortly, thereafter the District Attorney dropped the case.** California druggists attached great significance to this incident, but the District attorney's explanation was that he dropped the case because the evidence was insufficient. NRA then called a Compliance Council hearing and, on June 6, 1934, ordered Thrifty to surrender its Blue Eagle. On June 27, 1934, the State NRA Director for California called a hearing, and reported to the Compliance Division in Washington that Thrifty had been complying satisfactorily with the code since June 1st. On the State Director's recommendation, General Johnson On June 6, 1934, ordered the restoration of Thrifty's Eagle provided the

(*) For further details of the Johnson Perfume Co. Case, see Litigation Division files; Compliance Division files, and folder marked with name of this respondent in the Deputy's files.

(**) See letter from Harold W. Webster, member of the Los Angeles local Drug code authority to Mrs Gretchen /Cunningham, NRA Division of Research and Planning, 5/23/34; folder marked"Thrifty Drug Co." Deputy files.

firm would sign a certificate of compliance. Thrifty complied with the order and received its insignia. The State Director took this action against the wishes of the local and national code authorities, and without the knowledge of the Deputy Administrator. It so enraged the California druggists that they called a Mass meeting for the purpose of turning in all of their Blue Eagles to NRA. The trade association leaders, however, assumed control of the situation and the druggists contented themselves with passing a resolution asking the removal of the State Director. Following the meeting, the California situation became quieter, but the local code authority complained of frequent clearance sales on Thrifty's part; and NRA had evidence that Thrifty and the code authority were in almost constant disagreement over minor points where the issue made a few cents difference in the permissible selling price. NRA received frequent telegrams from both parties asking for rulings on these points. (*) But if there was evidence that Thrifty annoyed the code authority by too frequent clearance sales and by sailing as close to the code minimum as possible, there was also evidence that the code authority annoyed Thrifty by being overzealous in its attention to this firm's prices. (**)

The Thrifty case culminated in the local code authority bringing suit in a state court under the California NRA Act in 1935. The matter was handled entirely in California; hence the Washington record does not show the details, except that the code authority lost the suit, one of the grounds of the decision being that it had failed to prove that a sale below code price by a drug clerk was an act authorized by the firm. Since the case was criminal in nature, the respondent's guilt could not rest upon an unauthorized act of his agent.

5. COURT CASES OF THE NEW YORK CITY CODE AUTHORITY.

New York State had its own NRA Act, called the Shackno Act, and under it the New York city local code authority brought a number of court cases. So well did this code authority handle these cases, that NRA did not interfere except to require that the code authority obtain permission from the State NRA Director prior to filing each case. (***) Though the New York Code Authority filed many suits, it obtained final court judgment in only two, because of the crowded condition of the court calendar. Most of the actions were criminal and were first brought before a magistrate who

---

(*) These telegrams are in the folders marked "Thrifty Drug Co.", "Explanations", and "Rulings"; Deputy's files.

(**) Thrifty's attorney visited the Assistant Deputy Administrator at the latter's office in the spring of 1935, and explained Thrifty's side of the case. He asserted that Thrifty fully intended to comply with the code, and that local code authority was more harsh than the facts warranted.

(***) One of the results of the independence of their endeavor, however, was that the Deputy demanded no regular reports from them but kept track of what they were doing only in a general way through telephone conversations and informal letters. This was a sufficient control at the time but prevents this report from containing more specific information about the cases.

heard evidence and determined whether to dismiss the case or refer it to the Court of Special Sessions. The code authority obtained many rulings from magistrates favorable to its cause and in some cases, the respondent thereupon signed an agreement to comply in the future, without going to trial. Of the two cases on which the code authority obtained final judgment, one did not concern the loss limitation provision, but involved substitution of ingredients in a doctor's prescription. The respondent was fined $500. The second was an equity case, and the court issued an injunction restraining the respondent from further sales below code prices.

In the spring of 1935, the New York courts declared the Schackno Act unconstitutional, but the legislature had anticipated that decision and had passed a new law, the Joseph Act, ready for the governor's signature. The new law did not become effective immediately, however, because it required the secretary of state to approve or disapprove each individual code; and he did not approve the drug code prior to the Schecter decision.

CHAPTER VII. EFFECTS OF THE LOSS LIMITATION PROVISION

I. FOREWORD

Little evidence is available upon the effects of the loss limitation provision of the Retail Drug Code. Lack of time and personnel, and other considerations prevented the execution of plans for questionnaire surveys and field interviews contemplated at the beginning of this study.

Sections II, III, and IV of this Chapter embrace data from several existing studies, and such meager data as exists in NRA files. The result is a very inconclusive treatment of the effects of the loss limitation provision, but it serves to present at least some evidence upon the more obvious points of inquiry, such as the effect upon consumer prices, retailers' margins, dispersion of prices, and private brands.

Throughout the following discussion, practically the only available statistical data pertains to prices. There are not figures on the volume of the various items or stores studied, and this lack necessarily renders some of the conclusions subject to modification, or even reversal, on the basis of a more complete survey. For example, price data seems to indicate that more prices went down than went up under the code minimum provision. While the evidence establishes this fact quite strongly, it may be going too far to reason that, as a result, the consumer benefitted. If volume data should show that the items lowered in price were heavily used by consumers and those raised in price were little used, the consumer undoubtedly benefitted. If both types of items were heavily used, the relative use and the relative price movement of each would need evaluation to determine the net effect on the consumer's purse. If, on the other hand, the items raised in price were mostly popular items and those reduced were little used, the consumer must have suffered. Similarly, the absence of volume data prohibits any attempt to state definitely whether the excess of price reductions over price increases harmed the small druggist.

II. STUDY OF 12 DRUG ITEMS IN 108 MANHATTAN DRUG STORES

In an unpublished manuscript entitled "Price Uniformity Within Markets As Measured by Retail Prices of Twelve Leading Drug Items," dated March 3, 1935, Mr. Richard Glenn Gettell, graduate student of the University of California, analyzes prices in 108 Manhattan drug stores during two periods: March 1934, prior to the approval of the March amendment, and November 1934, after the approval of the September amendment. (*) He directs his analysis toward the effect of the loss limitation provision on the level of prices and on price uniformity (or rather the lack of it). (**)

The twelve items under study bear the following designations throughout the remainder of this Section:

Liquid Oral Antiseptic No. 1	Toothpaste No. 1
Liquid Oral Antiseptic No. 2	Toothpaste No. 2
Sanitary Napkins No. 1	Tooth Powder No. 1
Sanitary Napkins No. 2	Laxative Pills No. 1
Razor Blades No. 1	Aspirin Tablets No. 1 (box of 12)
Razor Blades No. 2	Liquid Laxative No. 1

The following charts show the number of stores offering each item at or below each given price, pre-code and during code. The first three charts cover individual items, and the last covers the aggregate price for the 12 items. We have been forced to omit the individual charts for nine of the twelve items because of lack of time and space, but the others are amply illustrative of the points considered. Each chart shows the code minimum price and, where there was one, the manufacturer's suggested minimum resale price, used in conjunction with his refusal-to-sell policy. (***) Retailers cutting below the suggested price faced the possibility of being "cut off" by the manufacturer.

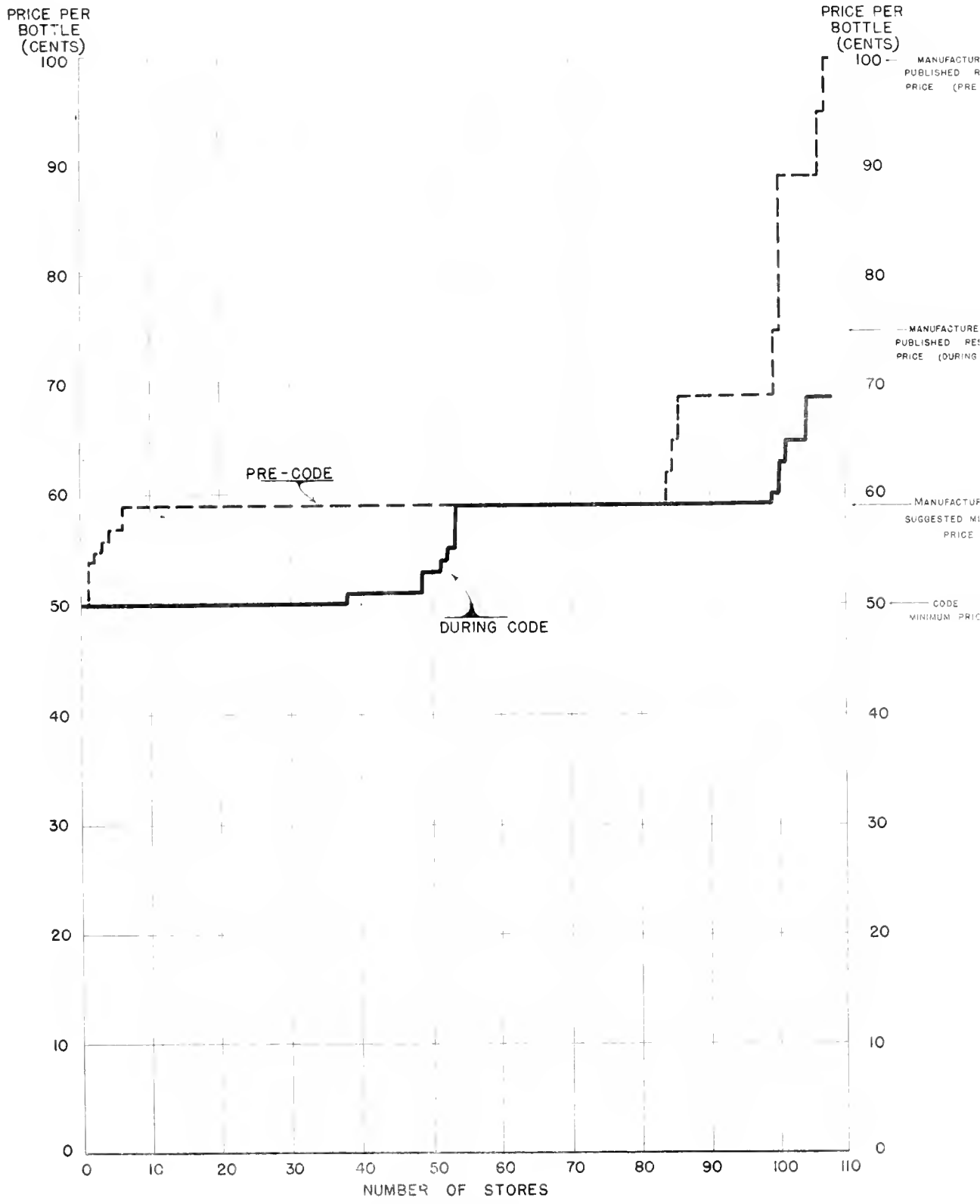
(*) Throughout this section, these two periods are called, respectively: "pre-code" and "during code," or "pre-code period" and "code period." For all of the 108 stores, the "code period" was December instead of November, 1934. Mr. Gettell obtained his factual data from surveys of Merchandising Facts, Inc., New York City.

(**) Mr. Gettell's full report covers also the variations between individual retailers' methods of adjusting prices to the loss limitation provision. Time and space do not permit the inclusion of this material here.

(***) We have made some changes, purely as to form, in Mr. Gettell's original charts, by amplifying the descriptions of the ordinate and abscissa, adding a legend, enlarging upon the title, and changing his phrase "post-code" to "during code." In substance, however, the charts remain as he drew them. Tables of basic data from which the charts were drawn are in the Appendix, Pages 426 - 430.

LIQUID ORAL ANTISEPTIC NO. 1

RETAIL PRICES IN 108 IDENTICAL RETAIL DRUG STORES BEFORE AND DURING THE "LOSS LIMITATION" PROVISION, MANHATTAN, NEW YORK



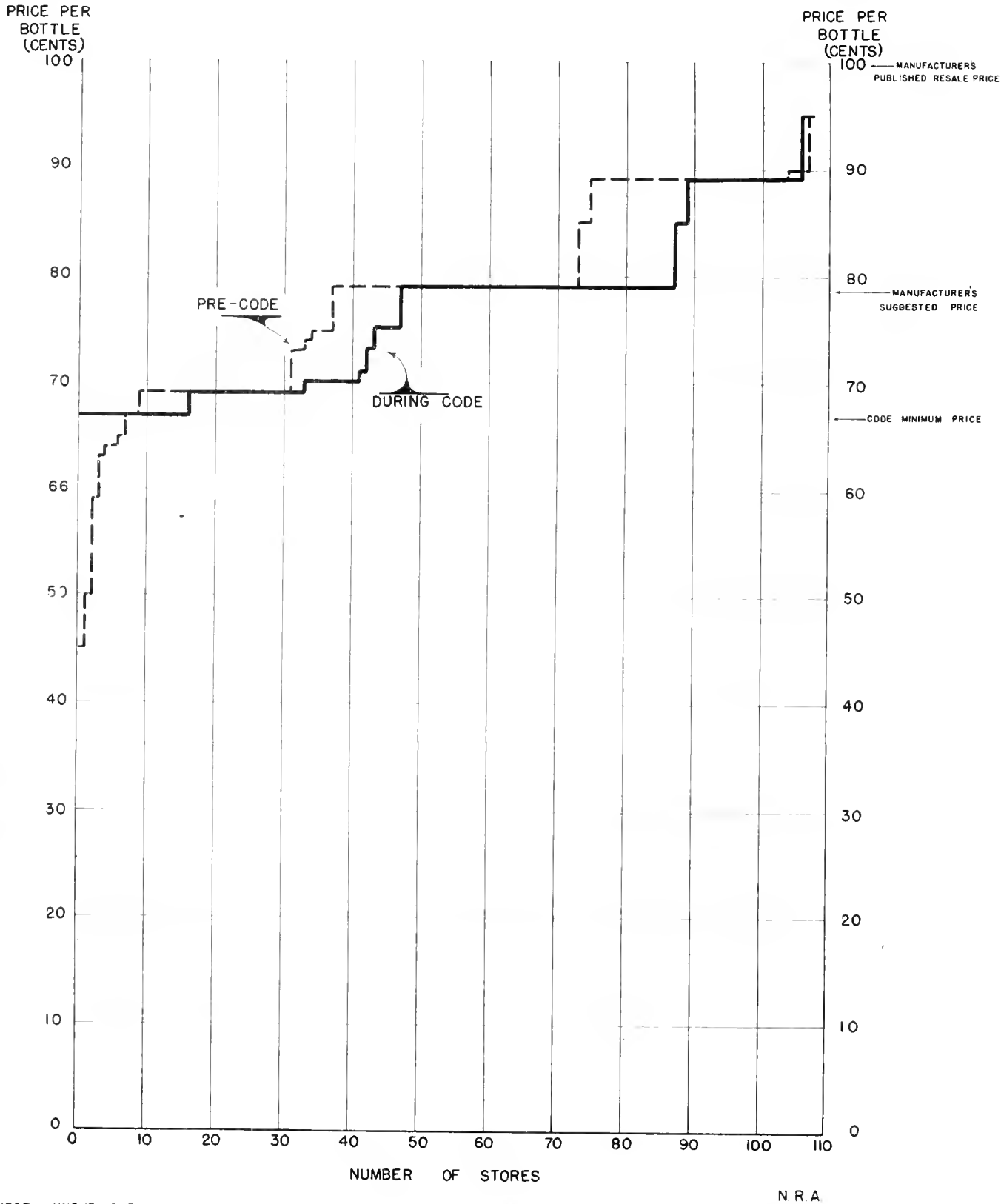
SOURCE: UNPUBLISHED M.S. BY R.G. GETTELL, UNIVERSITY OF CALIFORNIA. MARCH 3, 1935, ADJUSTED BY N R A

N R A
DIVISION OF REVIEW
STATISTICS SECTION
NO463

SERIES I
A

LIQUID ORAL ANTISEPTIC NO. 2

RETAIL PRICES IN 108 IDENTICAL RETAIL DRUG STORES BEFORE AND DURING THE "LOSS LIMITATION" PROVISION, MANHATTAN, NEW YORK

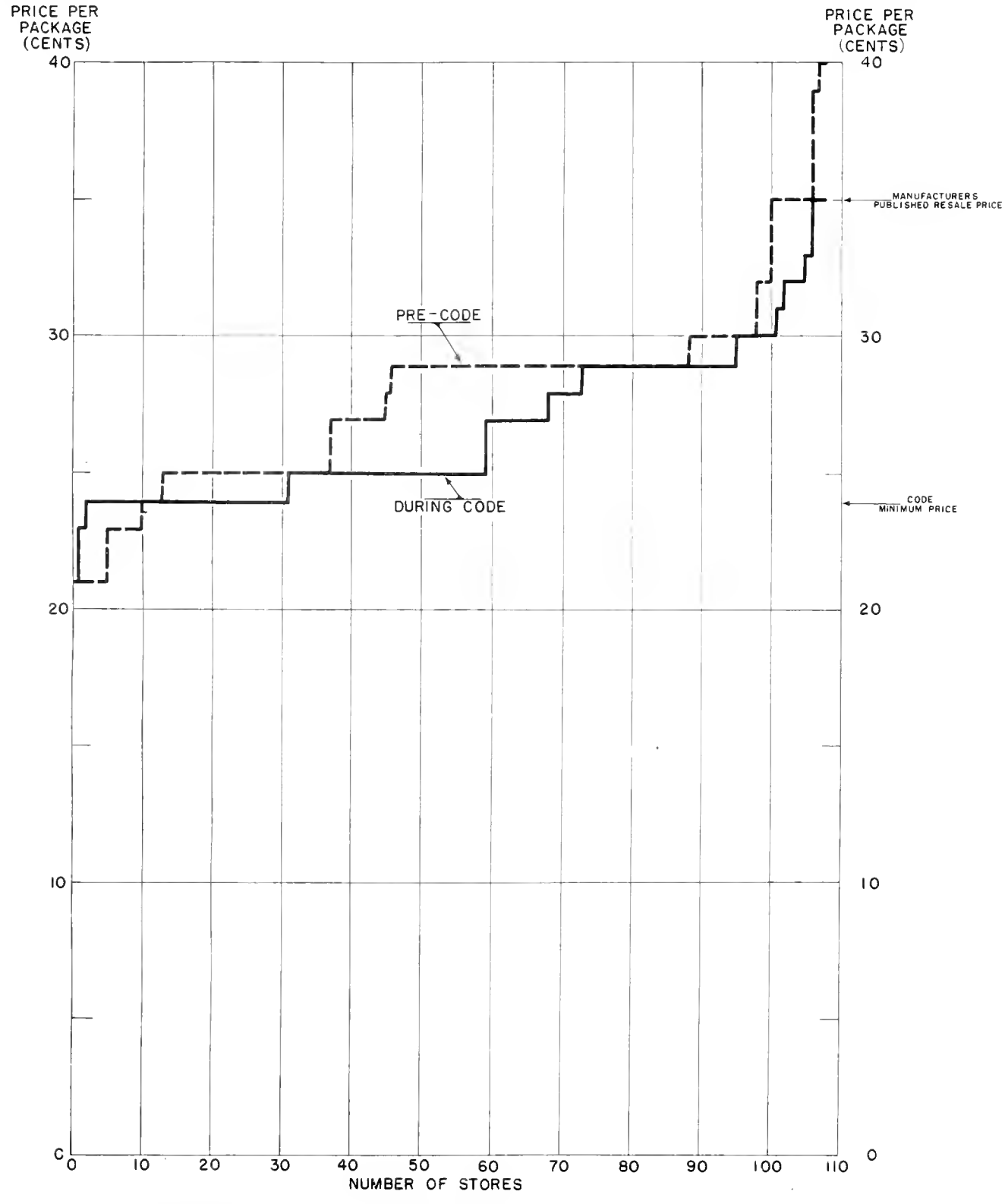


SOURCE: UNPUBLISHED M.S. BY R.G. GETTELL, UNIVERSITY OF CALIFORNIA.
MARCH 3, 1935 ADJUSTED BY N.R.A

N. R. A.
DIVISION OF REVIEW
STATISTICS SECTION
NO. 464

RAZOR BLADES NO. 2

RETAIL PRICES IN 108 IDENTICAL RETAIL DRUG STORES BEFORE AND DURING THE "LOSS LIMITATION" PROVISION, MANHATTAN, NEW YORK



SOURCE: UNPUBLISHED M S BY R. G. GETTELL, UNIVERSITY OF CALIFORNIA, MARCH 3, 1935, ADJUSTED BY NRA

NRA
DIVISION OF REVIEW
STATISTICS SECTION
NO. 466

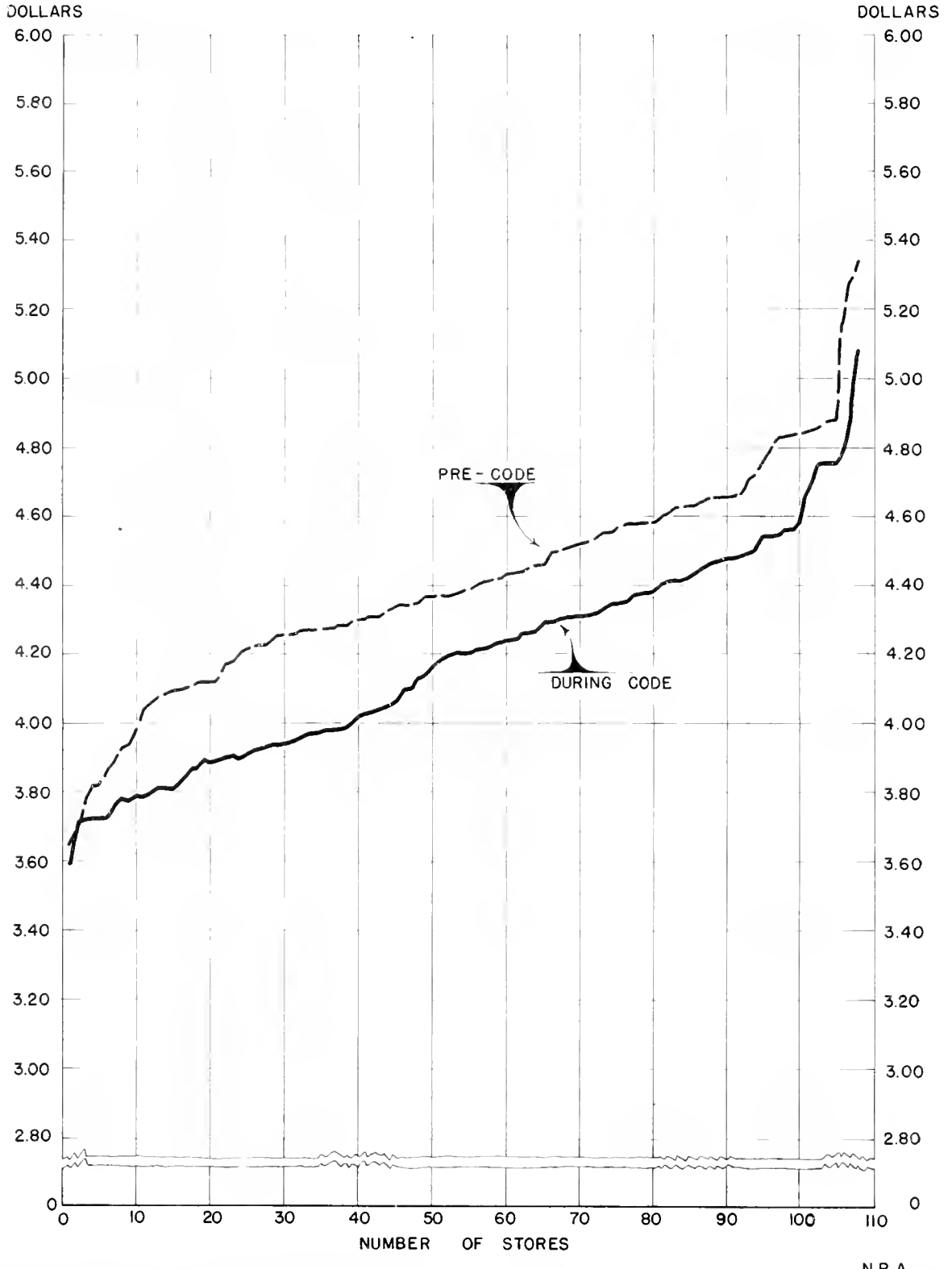
SERIES I

D

9726

AGGREGATE OF THE TWELVE ITEMS

RETAIL PRICES IN 108 IDENTICAL RETAIL DRUG STORES BEFORE AND DURING THE "LOSS LIMITATION" PROVISION, MANHATTAN, NEW YORK



SOURCE: UNPUBLISHED M.S. BY R G GETTELL, UNIVERSITY OF CALIFORNIA, MARCH 3, 1935, ADJUSTED BY N R A

N.R.A.
DIVISION OF REVIEW
STATISTICS SECTION
NO 461

SERIES I
X

9726

These charts show that upon the items studied, price uniformity among the 108 stores did not exist, either pre-code or during the code; but that the loss limitation provision reduced the range of price quotations and narrowed the price extremes substantially. The following table brings out this point more clearly by showing the price range among the 108 stores pre-code and during the code, and the price range for the middle 100 stores during these same periods. The middle 100 group omits the four stores with the highest and the four with the lowest quotations, in order to eliminate possible freaks.

TABLE I - EXTENT OF PRICE SPREAD - 108 MANHATTAN DRUG STORES

12 Leading Drug Items

Item	Price Spread 108 Stores		Price Spread - Middle 100 Stores	
	Pre-Code	During Code	Pre-Code	During Code
Liquid Oral Antiseptic No. 1.....	$.50	$.19	$.32	$.15
Liquid Oral Antiseptic No. 2.....	.30	.28	.25	.22
Sanitary Napkins No. 1.....	.10	.05	.08	.04
Sanitary Napkins No. 2.....	.11	.06	.06	.04
Razor Blades No. 1.	.11	.06	.04	.06
Razor Blades No. 2.	.19	.14	.14	.08
Toothpaste No. 1..	.16	.16	.09	.05
Toothpaste No. 2..	.11	.05	.09	.04
Tooth Powder No. 1.	.14	.17	.11	.14
Laxative Pills No. 1	.12	.10	.06	.05
Aspirin Tablets No. 1 (box of 12).....	.04	.05	.03	.05
Liquid Laxative No. 1	.36	.38	.32	.22
Aggregate.....	1.70	1.49	1.06	1.01

For source see page 134 of this report.

This table shows the narrowing of extremes in price since the establishment of the code minimum price. Also, the difference between the data for the 108 stores and that for the middle 100, shows that the few exceptionally high and low prices tended to come into line. For example, on Liquid Oral Antiseptic No. 1, the 50¢ pre-code range declines to 32¢ (a decline of 36%) by the elimination of the four highest and four lowest prices, but during the code, this procedure reduces the range on this product from 19¢ to only 15¢ (a decline of only 21%). Where the range increased, as on Tooth Powder No. 1 and Aspirin Tablets No. 1, it was because of the addition of new low prices and not new high ones. On those two products, the code minimum was lower than the lowest pre-code price and probably attracted prices down to it.

The aggregate chart shows somewhat the same narrowing of extremes as the individual curves, but the elimination of the four highest and four lowest prices make the price ranges pre-code and during code very nearly equal, though the latter range is on a lower level than the former. The parallelism of the two curves bears this out. From these charts it seems that the code minimum largely accomplished its purpose of eliminating very low prices. At the same time, however, competition brought many higher prices down to the code minimum. The following table shows this fact:

TABLE II

EFFECT OF MINIMUM PRICE PROVISIONS

108 Manhattan Drug Stores

Item	Selling Below the Minimum		Selling at the Minimum	
	Pre-Code	During Code (Violations)	Pre-Code	During Code
Liquid Oral Antiseptic No. 1.....	0	0	1	38
Liquid Oral Antiseptic No. 2.....	7	0	2	16
Sanitary Napkins No. 1.....	14	5	10	59
Sanitary Napkins No. 2.....	27	4	1	36
Razor Blades No. 1	0	0	3	25
Razor Blades No. 2	10	2	3	29
Toothpaste No. 1..	18	1	9	29
Tooth paste No. 2.	2	1	3	17
Tooth Powder No. 1	0	1	0	47
Laxative Pills No. 1.....	10	1	1	15
Aspirin Tablets No. 1 (box of 12)....	0	0	0	17
Liquid Laxative No. 1.....	27	2	1	39
Total.....	111	17	34	367

For source see page 134 of this report.

This table shows that before the code four items, Liquid Oral Antiseptic No. 1, Razor Blades No. 1, Tooth Powder No. 1, and Aspirin Tablets No. 1, never sold below the manufacturer's wholesale list price per dozen (later the code minimum). The charts for these items show that the antiseptic, the blades and the aspirin each had a manufacturer's suggested minimum price before the code and that about 72% of the stores sold the antiseptic and about 90% sold the blades at exactly that price.

The great majority of stores sold the aspirin at its top price of 15¢, probably because of consumer acceptance of that price. Consumer acceptance seems the principal reason for the higher prices on the tooth powder. Mr. Gettell states that possibly the code minimum on these four products was lower than necessary to prevent destructive competition. But, stated previously in this Chapter, the code minimum was based, not on prevailing pre-code prices but upon the manufacturer's wholesale list price per dozen, a price substantially equal to the small druggist's merchandise cost.

Liquid Laxative No. 1 and Sanitary Napkins No. 2 are examples of items sold below the manufacturer's wholesale list price per dozen prior to the code. Twenty-five per cent of the stores sold the laxative below this price before the code; and two stores during the code. On the sanitary napkins, 5 stores sold below the minimum before the code, and 4 did so during the code. Mr. Gettell suggests several possible reasons for these low prices. Perhaps the items were not as thoroughly advertised as others, perhaps they were used more often as loss leaders, perhaps they suffered more from competition of substitutes, or perhaps the code minimum upon them was too high. Upon this latter point we must again comment that the code price was based upon an approximation of the small dealer's merchandise cost, and a lower minimum might not have accomplished the purpose of protecting small enterprise. In fact the loss limitation provision was meant to raise just such low prices as these.

The third and fourth columns of the preceding table show that the code tended to cause all prices to approach the minimum. Thus more prices tended to go down than up. The following table illustrates this point:

TABLE III

MOST FREQUENT PRICES, PRE CODE AND DURING CODE

108 Manhattan Drug Stores

Twelve Leading Drug Items

Item		Price Range	Most Frequent Prices			Number of Stores Selling at Most Frequent Prices			Number of Stores Selling at other Than Most Frequent Price
			1st	2nd	3rd	1st	2nd	3rd	
Liquid Oral Antiseptic No. 1	Pre	$.50-1.00	$.59	$.69	$.89	76	15	6	11
	During	.50- .69	.59	*.50	.51	42	38	11	17
Liquid Oral Antiseptic No. 2	Pre	.45- .95	.79	.89	.69	36	29	22	21
				89			17		
	During	.67- .95	.79	.69	*.67	40	17	16	18
Sanitary Napkins No. 1	Pre	.13- .23	.19	.20	.15	62	14	10	12
					.17			10	
	During	.16- .21	*.17	.19	.20	59	35	6	10
Sanitary Napkins No. 2	Pre	.13- .23	.19	.15	.20	50	18	10	12
				.17			18		
	During	.15- .21	*.16	.19	.17	36	23	27	16
Razor Blades No. 1	Pre	.19- .30	.25	.23	.19	98	6	3	3
	During	.19- .35	.25	*.19	.23	59	25	15	9
Razor Blades No. 2	Pre	.21- .40	.29	.25	.30	43	24	10	32
	During	.21- .35	*.24	.25	.29	29	28	22	29
Toothpaste No. 1	Pre	.29- .45	.39	.35	.34	56	19	9	24
	During	.29- .45	.39	*.34	.35	42	29	17	20
Toothpaste No. 2	Pre	.14- .25	.19	.20	.25	69	18	12	10
					.18			16	
	During	.15- .20	.19	*.16	.20	50	17	16	9
Tooth Powder No. 1	Pre	.36- .50	.45	.49	.39	43	24	21	20
	During	.33- .50	*.35	.39	.45	47	32	16	13
Laxative Pills No. 1	Pre	.13- .30	.25	.23	.19	79	14	8	7
	During	.19- .29	.25	.23	*.20	57	17	15	19
Aspirin Tablets No.1 (box of 12)	Pre	.11- .15	.15	.12	.13	97	6	4	1
	During	.10- .15	.15	.12	*.10	51	31	17	9
Liquid Laxative No. 1	Pre	.54- .90	.69	.79	.59	45	22	14	27
	During	.57- .95	.69	*.67	.79	42	39	12	15

For Source see Page 154 of this report

In six cases, on this table, there was a manufacturer's suggested minimum price as shown by the underlined figures; and in five of these six cases, this was the most frequent selling price both before and during the code. In the sixth case, Aspirin Tablets No. 1, consumer acceptance allowed the top price of 15¢ to prevail. In four of these six cases, the code minimum price (designated by an asterisk) was the second most frequent price during the code period; and on the aspirin the code minimum stood third, after the manufacturer's suggested price. On Liquid Oral Antiseptic No. 2, the code price stood third, two higher prices tying for second place.

On six products there was no manufacturer's suggested price, and on four of these the code minimum price was the most frequent price during the code period. On the fifth, the code minimum was the second most frequent price, and on the sixth, the third most frequent. In four cases out of the twelve, the most frequent price during the code was less than the most frequent pre-code price, and in the other eight cases, it was the same. This table indicates a tendency of prices to cluster at the manufacturer's suggested price where one existed, otherwise at the code minimum.

Another point standing out from the preceding table and charts is a tendency for prices during the code to cluster at two or three points instead of at a single level as in the pre-code period. Mr. Gettell suggests that these several points may have been way stations of prices on their way to the code minimum, or permanent levels reached after readjustment to the code. Still another interesting point is the tendency of prices to cluster at certain penny intervals, ending in 9 or 5. This was a custom of merchants, but the code seems to have disrupted it somewhat.

The following table, based on average prices, adds strength to the conslusion that the loss limitation provision counterbalanced the rising of of a few low prices by the lowering of many higher ones:

TABLE IV
AVERAGE PRICES, 108 MANHATTAN DRUG STORES

Twelve Leading Drug Items

Item	Average Price Pre-Code	Average Price During Code	% Change	Manufacturer's "Suggested" Price	Code Minimum Price
Liquid Oral Antiseptic No. 1	$.62.8	$.552	-12.1	$.59	$.50
Liquid Oral Antiseptic No. 2	.78.4	.767	- 2.2	.79	.67
Sanitary Napkins No. 1	.18.6	.178	- 4.3	-	.17
Sanitary Napkins No. 2	.17.9	.175	- 2.2	-	.16
Razor Blades No. 1	.24.7	.230	- 6.9	.25	.19
Razor Blades No. 2	.27.8	.266	- 4.3	-	.24
Toothpaste No. 1	.36.5	.368	+ .8	.39	.34
Toothpaste No. 2	.19.7	.183	- 7.1	.19	.16
Tooth Powder No. 1	.44.7	.385	-13.9	-	.35
Laxative Pills No. 1	.24.0	.236	- 1.7	-	.20
Aspirin Tablets No. 1 (box of 12)	.14.6	.131	-10.3	.12	.10
Liquid Laxative No. 1	.70.7	.713	+ .8	-	.67
Aggregate	$4.40.6	$4.183	- 5.1	-	$3.75

For Source see Page 134 of this report.

Mr. Gettell states that from this table it appears that the establishment of minimum code prices led to a net gain to the retailer in only two cases, and a net loss in ten. (*) He wonders whether the loss limitation provision was not the wholesalers' and consumers' gain and the retailers' loss.

(*) Mr. Gettell has a footnote in his report bearing on the above statement, as follows: "It should be pointed out that no volume data is available, and most of the conclusions herein are predicated on the impossible assumption that each store had an equal volume of trade both before and after (during) the code. Actually this assumption, though unreasonable, need not nullify the conclusions since it is inconceivable that all the price rises have been in large outlets and the declines in small ones, and since there is every reason to believe that any volume increases in the later period have been fully as much due to increased purchasing power as to decreased price."

The following table shows the number of stores raising, maintaining and lowering their prices on each item, and the total items raised, maintained and lowered. There is also a further breakdown with relation to the code minimum price. (*)

TABLE V

PRE-CODE TO DURING-CODE PRICE READJUSTMENT

108 Manhattan Drug Stores

Twelve Leading Drug Items

	Lowered			Maintained			Raised		
Item	Total	To Minimum or below	To Above Minimum	Total	At Minimum or below	Above Minimum	Total	To Minimum or below	To Above Minimum
Liquid Oral Antiseptic No. 1	68	37	31	37	1	36	3	0	3
Liquid Oral Antiseptic No. 2	39	10	29	36	1	35	33	5	28
Sanitary Napkins No. 1	53	42 d/	11	38	9	29	17	13 a/	4
Sanitary Napkins No. 2	51	28 c/	23	30	1 a/	29	27	11	16
Razor Blades No. 1	45	24	21	60	1	59	3	0	3
Razor Blades No. 2	51	22 b/	29	36	3	33	21	6	15
Toothpaste No. 1	33	15 a/	18	40	5	35	35	10	25
Toothpaste No. 2	57	14 a/	43	44	3	41	7	1	6
Tooth Powder No. 1	92	48 a/	44	11	0	11	5	0	5
Laxative Pills No. 1	33	9 a/	24	54	0	54	21	7	14
Aspirin Tablets No. 1 (bx.of 12)	55	17	38	51	0	51	2	0	2
Liquid Laxative No. 1	37	25 a/	12	38	2 a/	36	33	14	19
Total	614	291	323	475	26	449	207	67	140
% of Total	47	22	25	37	2	35	16	5	11

For Source see Page 134 of this report.

a/ One price below the minimum
b/ Two prices below the minimum
c/ Three prices below the minimum
d/ Four prices below the minimum

(*) See next page for note.

This table shows that, out of a total of 1,296 prices, roughly one-sixth were raised, slightly more than one-third were maintained, and almost one-half were lowered. In accordance with the purpose of the loss limitation provision, about 5% of the prices rose from low levels to the code minimum; but to counteract this, 21% of the prices descended from higher levels to the code minimum. Of the prices above the minimum, about 35% remained unchanged, 25% went down, and 11% went up. Before the code, 89% of the prices were above the code minimum, but during the code this figure was only 71%.

The following chart, based on the aggregate price for the twelve items, shows the readjustment in each store on account of the code. It is a scatter-diagram with each dot representing a store and showing the pre-code price and the price during the code charged by that store. The line marked "price maintenance" represents points of no change in price from pre-code to code period. Thus all dots to the right of this line indicate stores with aggregate price reductions under the code, and dots to the left indicate stores with aggregate price increases. The encircled dots are the extreme high and low price quotations, and the "X" is an aggregate of the most frequent price of each item.(**)

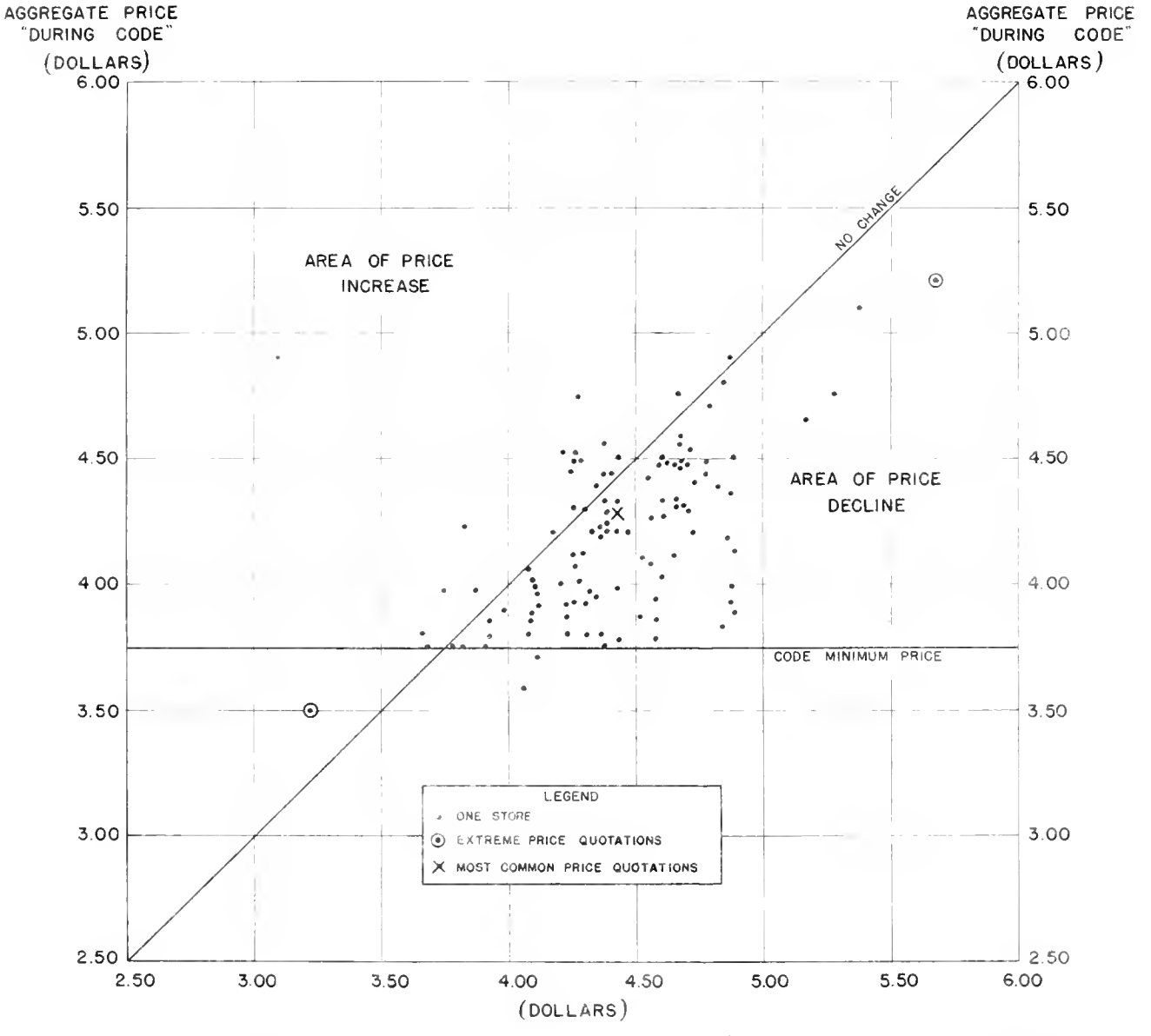
(*) Preceding this table, in Mr. Gattell's report, is a series of 12 charts (one for each item) in the form of scatter-diagrams, showing the price charged by each store pre-code and during the code for each item. Space does not permit the inclusion of these charts here. Briefly, they show that more stores lowered the price on each item than raised it, but that the action of individual stores in adjusting their prices was not uniform. Many stores maintained prices above the code minimum, and some even raised them.

(**) The basic table for this chart is in the Appendix, pages 426 - 427.

DISPERSION OF RETAIL PRICE CHANGE

108 MANHATTAN DRUG STORES

(AGGREGATE OF THE TWELVE ITEMS)



SOURCE: UNPUBLISHED M.S. BY R.G. GETTELL, UNIVERSITY OF CALIFORNIA, MARCH 3, 1935 ADJUSTED BY N.R.A.

N.R.A.
DIVISION OF REVIEW
STATISTICS SECTION
NO. 462

SERIES I
Y

6

The chart shows that 20 stores raised their aggregate parices above their pre-code levels, but that 67 stores reduced theirs. One store maintained its aggregate pre-code price. The chart also emphasizes the non-uniformity of behavior of individual stores. Though the majority decreased their prices, not all of the decreases were from high levels. Likewise, not all of the increases were from low levels.

Breaking down the factual data on the 108 stores into six districts, each representing a rough shopping center,* reveals much the same divergences in the behavior of individual stores. The only apparent difference between districts is in the level of prices, levels in the higher income districts being higher.

A comparison of the prices on the twelve items during the code period in fourteen cities (including New York)**, indicates roughly a similarity between the markets. Though prices outside New York were on a slightly higher level, there was the same familiar clustering of prices at intervals such as the manufactuer's suggested price, the code minimum price, and prices ending in 9 or 5. This similarity between markets makes it probable that price behavior in Manhattan is not unlike that in other cities, and tends to validate the conclusions reached from the study of Manhattan stores.*** Mr. Gettell draws the following conclusions, tentatively, from the data contained in his report.****

(*) District I, 9 stores, Upper Manhattan near entrance to George Washington Bridge; II, 23 stores, Upper East Side, 3rd Avenue to East River, and 72nd to 98rd streets; III, 19 stores, West-Side Midtown, 6th Avenue to Hudson, 14th to 42nd streets; IV, 16 stores, Central Park West to Hudson, 72nd to 86th streets; V, 18 stores, Central Park West to Hudson, 86th to 96th streets; VI, 23 stores, Inwood and Fort George, Harlem to Hudson rivers, 187th to 220th streets.
Space does not permit the inclusion here of Mr. Gettell's charts and tables upon the individual districts.

(**) Chicago, Cleveland, Dallas, Denver, Detroit, Fort Worth, Minneapolis, New York, Omaha, Philadelphia, Pittsburgh, St. Louis, St. Paul and San Francisco.

(***) Mr. Gettell's report contains 12 tables (one for each item) showing the prices in the fourteen cities. Space does not permit the inclusion of these tables in this report.

(****) Only his conclusions upon matters of present moment to this study appear here.

1. Even on identical, branded, nationally-advertised products there was no retail price uniformity either in the city of New York as a whole or in shopping areas within the city. However, the loss limitation provision tended to reduce the range of prices.

2. What uniformity existed cannot be attributed to pressure of supply and demand, but to artificial causes and rigidities, such as refusal-to-sell activities of manufacturers, the code loss limitation provision, and the custom of setting prices ending in 9 or 5.

3. The code minimum tended to draw prices toward it, and to cause more prices to go down than up. This tendency may have made the loss limitation provision a boomerang to the small druggist. With the code price located little above his merchandise cost, the small druggist could not afford a wholesale reduction of prices to, or substantially toward, that minimum, unless he obtained sufficient increases in volume to off-set his loss of margin, or was able to change his merchandising methods to his advantage.*

(*) Section IV of this Chapter contains evidence to show that some small druggists definitely felt the pinch of lower prices under the loss limitation provision, and apparently received no compensating increases in volume.

III. STUDY OF 50 ITEMS OF 30 STORES IN FOUR CITIES

An early NRA study entitled "A Survey of the Effect on the Retail Drug Trade and on the Consumer of the Loss Limitation Provision of the Retail Drug Code", analyzes price data from 30 stores and cost data from 29, located in the cities of Washington, Philadelphia, New York and Albany. (*) The figures cover two periods: immediately prior to the March amendment (designated "pre-code"), and during the existence of the March amendment, between May 20th and June 5, 1934 (designated "during the code"). In addition to the statistical survey, this study includes some field interview work in seven cities in Virginia, covering 47 stores. (**) Throughout the statistical part of the survey all prices and costs are reduced to indices with the code minimum price equal to 100; thus discounts and mark-ups appear at a glance.

The survey contains some interesting charts showing the average cost of the 50 items to retailers, broken down by types of store, and further broken down into the pre-code and code periods. Space does not permit their inclusion here, but in general they show that both before and during the March amendment, for all three types of store (independent, chain and department store), cost clustered principally at two points, one being from 1% to 3% below the code minimum and the other from 12% to 18% below it. Chains and department stores had more large discounts than independents. The advent of the March amendment seems to have decreased slightly the number of larger discounts received by all types of store. The survey states that there was an increase in merchandise cost on an average of four items per store, ranging from zero to 33 percent of the code minimum per store; and a decrease on an average of three items per store, ranging from zero to 14 percent per store. The survey states that cost decreases were due to lowering of manufacturers' prices, and increases were due to a tendency of manufacturers and some wholesalers to eliminate special discounts.

(*) This was a study of the Research and Planning Division of NRA, prepared by Miss Anne Golden, July 7, 1934, and approved by Charles F. Roos.

(**) The cities were: Alexandria, Fredericksburg, Richmond, Petersburg, Charlottesville, Lynchburg and Culpeper.

The survey also presents the following table:

AVERAGE PRE-CODE AND DURING-CODE COSTS AND PRICES

Store	Pre-Code Costs	Pre-Code Prices	During-Code Costs	During-Code Prices
1	95.9	108.4	95.6	108.9
2	92.0	130.8	96.6	117.6
3	98.4	132.8	96.7	130.1
4	91.3	109.4	91.1	110.8
5	97.9	133.5	92.1	127.0
6	86.9	99.4	87.4	105.0
7	88.1	98.5	88.0	102.9
8	91.9	120.6	95.8	96.5
9	92.5	121.2	90.8	112.4
10	88.6	94.2	88.6	100.4
11	79.3	100.9	86.0	102.5
12	92.4	114.4	92.4	117.3
13	83.9	110.8	83.9	113.6
14	Not reported	117.3	Not reported	122.7
15	84.8	100.8	85.6	108.7
16	92.3	112.0	98.7	117.0
17	87.7	111.7	871.	116.2
18	92.7	129.7	90.9	127.3
19	94.1	128.6	92.3	124.6
20	99.0	109.5	95.7	107.6
21	99.9	125.5	98.7	123.1
22	92.3	124.4	92.3	124.4
23	97.9	135.1	95.6	133.6
24	96.0	127.4	91.2	117.6
25	94.0	132.6	92.5	129.5
26	92.4	113.4	91.5	114.8
27	88.0	117.2	87.6	117.8
28	99.0	110.8	99.0	112.1
29	86.7	135.2	86.7	108.1
30	85.2	101.2	85.1	105.8
Average	91.8	116.9	91.6	115.2

For source see Page 150 of this report

This table shows that of the 29 stores reporting costs, six showed average increases, six showed no change, and 17 showed decreases. Of the 30 stores reporting prices, 16 showed average increases, one showed no change, and 13 showed decreases.

With respect to prices, the survey states that decreases under the March amendment ranged from zero items by a pine board store to 40 items by an independent in a highly competitive neighborhood of New York. The number of increases ranged from zero to 20 items for a pine board store, and 21 items for an independent situated in the heart of a cut-rate neighborhood. The survey states that the effect of the March amendment in some instances was a wholesale reduction in selling prices by some retailers, but adds that the code minimum obviously did not effect retailers not situated near cut-rate stores.

Both pine board and independent, according to the survey, raised prices from below the code minimum to almost exactly the code minimum. The pine board raised prices from a pre-code average of 98.5% of the code minimum to 102.9% of the code minimum; and the independent from 100.8% of the code minimum to 108.7% of the code minimum.

The survey goes on to state that, with but few exceptions, price increases found a counterbalance in price decreases caused either by reductions of manufacturers' prices or price reductions by the retailer.

The survey states that it is not illogical to assume that many manufacturers' price reductions after the approval of the March amendment were a result of that amendment. Manufacturers of products formerly cut low in price faced a loss of sales volume if their retail prices rose to the code minimum. To counteract this, they either had to increase their consumer advertising or reduce their prices. Increased advertising might not have counterbalanced the low price appeal of private brands or competing standard brands.

The elimination of the loss leader by the March amendment, according to the survey, brought about two distinct trends. One was a broad reduction in prices to the code minimum on many items by many retailers. Independents previously afraid to engage in price competition, did so without fear, knowing th t the March amendment kept the practice within bounds. Chains, department stores and some independents turned toward private brands as leaders, reducing the prices on these to attractive levels. (*)

(*) Neither the March nor September amendments established any minimum price on private brands.

An analysis of retailers' advertising of drug and toiletries products in New York newspapers between January 1st and June 1st, 1934, showed that prior to the March amendment, 63% of the products advertised were nationally branded, and 37% were private brands. After the March amendment, 41% were national brands, and 59% private brands. Of 11 Manufacturers reporting on the effect of the March amendment on private brands, one foresaw an increase in his own private brand manufacturing business, two felt that there would be no change in the relation between private brands and national brands, two felt that there might be a change, but that it would not be important, and the rest either did not consider the problem important or were contemplating changes in their own policies.

The survey sees from the operation of the March amendment a definite shift of the burden of price competition from the retailers and wholesalers to the manufacturer. Previously, the manufacturer was able to maintain high prices to small retailers and wholesalers and grant large discounts to favored customers, and sit back and let retail price cutting take care of consumer resistance. The March amendment, however, checked retail price cutting, and the manufacturer had to give up some of his own income to maintain consumer goodwill.

At first glance the above conclusion seems to conflict with Mr. Gettell's statement that the depressing of prices toward the code minimum may have harmed the little druggist. In other words, it may seem inconsistent to state that the loss limitation provision shifted the burden of price cutting from the retailers to the manufacturers, and at the same time to state that it increased price cutting to the detriment of the retailers. However, there is an explanation that may harmonize the two views.

Prior to the code, price competition at retail had driven the prevailing price of perhaps 200 commodities below the later-adopted code minimum price. These items were the leaders used by chains and price cutters to draw trade. However, on the remainder of the 10,000 or more products in the druggist's stock, the prevailing price remained higher than the code minimum. Price competition shifted from retailer to manufacturer, under the loss limitation provision, only on those products with previously prevailing prices below the code minimum. The manufacturer could not afford a sharp rise in the retail price of his product, and accordingly had to assume the burden of lowering its code minimum. The price cut had to come from his and not from the retailer's margin of profit. However, on products previously sold above the code minimum, the manufacturer had no cause to change his price structure. Retail price competition had moved up to a higher level, and had commenced to operate over a wide range of products theretofore touched by it only lightly. Prices on these products began to decend to the code minimum, a level below the total operating cost of small druggists. Here there was no shift of the burden of price competition from retailers to manufacturers, but rather the opening of a new field of retail price competition; and, whether true or not, it would at least not be inconsistent to say that the small druggist had suffered from the new competition even while benefitting from the shift of the old to manufacturers. However, in the absence of volume data, the actual effect on both

manufacturer and retailer remains undetermined.

This survey concludes that, as a result of the March amendment, the range of mark-up was lower, so that there was less of the practice of making users of "non-footballed" items pay for the loss leaders; prices were more uniform; consumers, at least in Washington, were becoming aware that they could buy as cheaply from their neighborhood stores as from downtown stores; the urge to substitute inferior goods had largely disappeared; and prices to the consumer on many items had gone down so as to counterbalance to an unknown degree, the expected rise on others.

IV. MISCELLANEOUS DATA: MATERIAL FROM NRA FILES

In addition to the two studies digested above, one other outside study contains a table of interest to this discussion and there is a small amount of material in NRA files. "Retail Price Behavior", by John H. Cover, professor of Statistics, University of Chicago, (*) contains as one of its major conclusions the statement that with few exceptions - notably drugs, toiletries and sundries - prices advanced markedly between 1933 and 1934. Drug, toiletry and sundry prices went down in all cities studied. To support this finding, the study contains the following table; (**)

(*) Published by the University of Chicago Press

(**) The survey covered 70 items in the drug, toiletry and sundry classification.

PRICE CHANGES OF COMMODITY GROUPS BY COMMUNITIES

(Per Cent 1934 of 1933 Prices*)

Commodity Group	Atlanta	Wash-ington	Man-hattan	Bronx	Brook-lyn Queens	Minnea-polis	St. Paul	Wib-bing	Man-kato	Wi-nona	Communi-ties
Drugs.....	96.84	98.30	97.49	97.34	97.13	95.68	96.36	96.80	98.10	98.05	97.19
Clothing, men's	118.00	124.08	122.28	118.54	123.68	115.40	117.19	120.05	119.03	118.14	119.65
Clothing, women's.....	112.59	118.40	111.61	119.46	120.79	97.81	118.14	110.10	122.89	123.45	116.43
Clothing, children's.....	118.40	118.85	120.14	119.26	119.63	111.93	114.96	110.82	134.30	121.61	117.91
Shoes.....	109.96	112.04	106.63	106.68	106.97	109.35	108.63	113.31	106.99	106.94	108.50
Yard goods.....	121.01	125.47	127.87	123.78	119.97	115.31	112.49	121.55	133.24	122.60	121.44
Furniture.....	119.79	125.54	113.24	112.63	110.44	114.02	116.35	118.58	116.07	110.87	115.63
Household equipment.....	122.93	110.15	101.41	102.49	106.85	101.91	106.01	110.38	104.01	107.17	106.65
Eight comparable commodities.....	117.89	121.31	113.76	112.82	114.44	109.92	115.10	114.69	115.65	114.27	114.95
Foods.....	.....	.....	.....	.....	.....	109.24	109.37	.....	.....	.....	109.31
Paints and Hardware.....	.....	106.08	.....	.....	.....	101.10	110.64	102.58	117.05	115.89	109.88
Nine or ten commodities.	.....	119.75	.....	.....	.....	109.40	114.64	113.77	116.14	114.46	114.66

* Relatives of aggregates of means.

SOURCE: Retail Price Behavior - John H. Cover

NRA files contain an important piece of evidence on the effect of the loss limitation provision in the form of a list of practically all manufacturers' price reductions from the approval of the March amendments to October, 1934.* The list shows that 30 manufacturers lowered their code minimum prices on a total of 61 items, while only 6 manufacturers raised their code minimum prices on a total of only 20 items. Decreases ranged from 2% to 43% and averaged 14%. Increases ranged from 6% to 29% and averaged 13.4%. A consumer buying one of each product on the list would have saved roughly 6.5% over previous prices. Practically all persons whose views are availiable, except the cut-raters, attributed the manufacturers' price reductions to the loss limitation provision. The cut-rater group, at the public hearing of June, 1934, warned of manufacturers' price increases as soon as the hearing terminated,** but these increases did not materialize.

All evidence at hand indicates that prices to the consumer on drug and cosmetic products decreased on a large number of items, and increased on relatively few under the loss limitation provision. One of the reasons assigned for this phenomenon, aside from price reductions by manufacturers, was the tendency of the code minimum price to attract prices to it from both directions. Since, under free competition, relatively few items sold below the manufacturer's wholesale list price per dozen while a large number sold above that price, the magnetic effect of the minimum caused more prices to go down than up.
Witnesses for the proponents at the hearing of June, 1934, argued this proposition strongly***, and even a witness for the opponents used it as a basis for argument.**** However, the proponents and the aforementioned witness for the opponents had different purposes in mind. The former employed this argument as their top card in winning NRA to the belief that their loss limitation provision was economically sound, but the latter urged that the depressing of consumer prices would eventually make the loss limitation provision harmful rather than beneficial to small druggists.

Mr. Gettell in his report***** saw in the reduction of prices to the consumer under the loss limitation provision a serious question of whether the small druggist had not sponsored a boomerang; and he indicated that a study of the small druggist's volume under the provision was needed to solve the point. This Unit has been unable to make such a study, but NRA files contain evidence bearing on the quotation in the form of letters from small druggists throughout the country

(*) Submitted to NRA on 10/30/34 by Geo. M. Gales; folder marked "Prices II", Deputy's files. Chapter V - Issues seen by Opposing Forces" - makes mention of this list.

(**) See Chapter V of this Part - Issues Seen by Opposing Forces. Page 80

(***) See Chapter V of this Part - Issues Seen by Opposing Forces. Page 30 et.

(****) Ibid. See also testimony of Q. Forrest Walker, transcript of June 7th, 1934, pages 89-117.

(*****) Digested in Section II of this Chapter Page 154 et.seq.

During the existence of the March and September amendments, NRA received from small druggists and from local associations of small druggists 104 letters and telegrams expressing some form of dissatisfaction with the loss limitation provision*, a few specifically complaining that, under the provision, the minimum price tended to become the maximum, forcing little dealers to sell at their merchandise cost, Fifty-nine of these letters complained that the code minimum price was too low, and asked NRA to fix a percentage mark-up, ranging from 10% to 27%. A batch of 22 letters was somewhat difficult to explain. Practically all were addressed to the President; and all asked that something be done to protect the small druggists from predatory price cutting, but not one of the letters mentioned the loss limitation provision or the code. It was as if the writer did not know of their existence, yet many of the letters came from large cities where code activity was great.

Excerpts from the following two letters are typical: One small druggist in New York City wrote to his local code authority,**.. the Drug Code and the Code Eagle have so far been such a disappointment as far as relieving our distressed conditions go that I would feel like a hypocrite to give the NRA any further lip service and display an Eagle as a sign of satisfaction with existing conditions when.... not an iota of relief has been granted us.

"..... I was able barely (to exist in business prior to the code) .... thanks to the fact that most retailers (when standard merchandise was cut in price) threw most advertised items out of their windows, cut a few nationally known items low as leaders and concentrated on own label or agency products that yielded a fair profit ..... You could not have found more than 5% of items (that were nationally known and cut in price) ..... in the .... stores in neighborhood. The public .... had learned to accept .... non-advertised goods.

"With the advent of the Code and the grossly unfair "Cost Price List' every retailer rushed like mad into filling his windows and counters with merchandise ... AT THE CODE PRICES. Even merchandise little known to the public and commanding a .... fair price before is now .... at code price ... the public is ... returning to demand branded profitless merchandise ....."

In transmitting this letter to NRA, the secretary of the local code authority stated that the letter representated the opinion of a good many druggist in New York City and probably all over the country, and touched upon facts that were absolutely true.

Another typical letter stated, "....when your competitor sells at the price you pay for merchandise and still make a profit of from 17% to 40% .... it means only one thing, the small retailer

(*) These letters are in the Deputy's files.

(**) See sheaf of correspondence headed by letter of 7/20/34, from Mark Merrell to Samuel A. Weiss; folder marked "Complaints;, Deputy's files.

has no chance ..... "*

These letters of dissatisfaction, standing alone, seem to bear out Mr. Gettell's feeling that the decrease in prices toward the code minimum may have hurt the small druggist more than he was benefitted by the prevention of loss leader selling. However, the letters are counterbalanced somewhat by a few letters expressing satisfaction with the loss limitation provision, and by the eagerness of druggists to spring to the aid of the provision whenever they saw a threat to its existence.

As long as the loss limitation provision remained in quiet operation, few druggists wrote NRA to express their gratuitous appreciation of it. The files contained only 9 such letters**

However, whenever it seemed to the druggist that the existence of the provision was in danger, they responded more strongly as individuals, and their leaders fought to keep the provision as hard as they had fought to obtain it. Such occasions arose several times during this course of NRA when some higher official made a public statement that NRA was ready to abandon all price fixing. At these times, NRA received a total of 20 letters, half from local associations of small druggists and half from individual small druggists, all earnestly protesting any attempt to remove the loss limitation provision from the code. In the spring of 1935, when doubts arose as to whether Congress would continue the NRA, drug trade leaders became especially active in support of the loss limitation provision. Letters from individual small druggists on this occasion were not numerous (there were 10 in all), but they responded to a questionnaire sent them by the National Retail Drug Code Authority with the followed vote:***

Question	Yes	No
Should Drug Code be continued?	90.2%	9.8%
Has the Retail Drug Code been beneficial?	89.7%	10.3%
Had it increased employment?	65.0%	35.0%
Have wages increase?	71.8%	28.2%
Have unethical practices been diminished?	81.6%	18.4%
Should some other form of control replace NRA,	12.3%	87.7%
Should control of sales-below-cost be continued?	92.7%	7.3%
Are all other trade practice provisions desired?	78.8%	21.2%

(*) Luten A. Mysl to the President, 10/22/34; "Complaints" folder; Deputy's files.

(**) All of these letters are in the Deputy's files.

(***) See "meoranda" folder; Deputy's files.

Source - Unknown number of replies to questionnaire sent out by 80 Local Code Authorities.

Local retail drug code authorities and local drug associations were active during this period, sending letters to the National Code Authority, to members of Congress and to NRA, and passing resolutions in favor of the continuance of the loss limitation provision. Even a few wholesalers and manufacturers wrote NRA or the President urging continuance of the Retail Drug Code and especially its price protection features.

The National Retail Drug Code Authority, composed of the national leaders of the small druggists , prepared briefs in defence of NRA, in defense of NRA's treatment of the small enterpriser, and in defense of their loss limitation provision, and appeared at hearings on NRA before both the Senate and House of Representatives. Even during the quiet periods when no threat loomed against the loss limitation provision, these national trade leaders seemed staunch in their feeling that the loss limitation provision, though far from a perfect protective device, was more beneficial than detrimental to the small druggist.

In view of the continued faith of the trade leaders, it is somewhat difficult to know what weight to give the letters of dissatisfaction from small druggists.
There is a possibility that they represented a growing feeling in the ranks of the trade, not known to the leaders. On the other hand, these letters may have been the complaints merely of marginal dealers. It would require a more exhaustive survey of trade opinion or a statistical survey of the effect of the code of business volume to settle the question.

In addition to the loss limitation provision's effect on prices, its effect on the relative volumes of private brand and national brand merchandise is important, though there is little material at hand to evaluate the trend. The early NRA report* pointed to the possibility that price cutters, relieved of the opportunity to sell nationally-known goods as loss leaders, were turning to private brands. Some of the cut-rate witnesses at the June hearing also foresaw this possibility and warned that it might result in a monoply for the chains, since the small druggist could not afford to carry a complete stock of his own products.**

(*) Digested in Section III of this Chapter.
Page 150 et, Seq.

(**) For the arguments of the cut-rate witnesses,
see Chapter V. of this Part - Issues Seen
by Opposing Forces. Page 104 et Seq.

Though there is no evidence one way or another upon the question of a monopoly, there is some evidence that chains and price cutters, and even a few small druggists (who turned cut-rate under the code) directed their sales efforts toward private brands. Two members of this Unit interviewed the president of one eastern regional chain of drug stores, and put to him the following key question: What did you do, or intend to do, to preserve your economic status and your reputation for low prices when the loss limitation provision prevented you from cutting the prices of standard brands below the manufacturer's wholesale list price per dozen? The answer was that the firm had removed its p.m.'s* from its private brands, and had revised its advertising policy so that, instead of printing mere price lists of standard brands to draw customers into the store, the firm commenced to advertise the quality and relatively low price of its own brands. Thus the firm was attempting to convince the consumer that private brand substitutes were just as good or better than standard brands, and cheaper. It is unfortunate that time and personnel did not permit similar interviews, using the same key question, with other chain and cut-rate executives.

The early NRA survey covered drug store advertising in New York, and presented further evidence that private brand sales efforts were increasing.** Opinion evidence of similar has come to the Unit from persons well acquainted with the trade, especially in New York.***

(*) "Push money" - commissions to clerks to induce the sale of certain articles.

(**) See Section III supra, page 153.

(***) In the Appendix, page 377, is an account of techniques developed during the course of this study to obtain price information from newspaper advertising. The principal purpose of this account is to point the way for future surveys, the actual evidence obtained under the limited facilities of this study being too fragmentary to permit the drafting of conclusions.

The techniques cover advertised prices of two chains over a period commencing prior to the Borah Amendment and continuing after the Schechter Decision; and also a measurement of the relative amount of advertising space given each class of commodities. This type of survey, if completed, would show whether a given price control induced a shift in advertising from standard to private brands; what changes the control made in price levels; effects of a price war on price levels; initiation of price cuts in a competitive situation; competition between standard brands within a store; and competition between standard and private brands within a store.

CHAPTER VIII - DESCRIPTION OF LOSS LIMITATION PROVISIONS IN OTHER RETAIL CODES

Though the emphasis in this report is on the retail drug trade, a description of the loss limitation provisions in other retail codes has value in showing other methods used in attacking the problem of price cutting. The description of each provision, given below, is brief and is accompanied by a comparison with the loss limitation provision of the Retail Drug Code.

I. THE RETAIL TOBACCO CODE.

The code for the Retail Tobacco Trade contained two separate price provisions, one applicable to the sale of cigars, and the other to the sale of cigarettes. The former, known as the "Cigar Merchandising Plan", consisted of a detailed set of related provisions in the codes for manufacturers, wholesalers and retailers in the tobacco business. The plan was lengthy and complicated, its more important provisions being, in substance, as follows:

1. Each manufacturer had to file with a Council (set up for the purpose) his retail price and a full schedule of his discounts to jobbers, retailers, and chains. Such discounts could not exceed certain maximum percentages set forth in the Plan. The manufacturer also had to mark his retail price prominently in each box of cigars.

2. Manufacturers selling direct to consumers had to abide by that part of the Plan applicable to retailers. But manufacturers who sold exclusively and directly to consumers were not subject to the Plan.

3. Jobbers and sub-jobbers also had to file with the Council a list of their discounts to retailers, and these discounts could not be greater than the manufacturer's discount to the jobber or sub-jobber.

4. If jobbers or sub-jobbers sold directly to the consumer, they had to abide by that part of the Plan applicable to retailers.

5. Retailers could not sell cigars at less than the retail price filed with the Council by the manufacturer, and could not give more than one pad of matches for each unit sold, or 5 pads per box of 25 cigars, or 10 pads per box of 50 cigars. However, when the retailer sold 10 to 24 units at a time to a customer (provided the units were not cheaper than 5¢ cigars), he could give the customer a 5% discount from the retail price; and if he sold 25 or more cigars, he could give a discount of 8%. In the last-mentioned instance, the manufacturer could file with the Council a price per box involving less than 8% discount; and

if he did this, and also marked his new price on the box, the retailer had to abide by this price.

6. If a retailer sold to a consumer who was situated in a state requiring a tax on cigars (other than a tax payable by the manufacturer), the retailer had to add the amount of such tax to the minimum price otherwise applicable, unless the tax were paid by the consumer. This rule applied even though the seller was outside the state (i.e., it applied to mail order sales).

7. Retailers could sell below the minimum prices merchandise sold as a bona fide clearance, or bona fide discontinued lines of merchandise or imperfect or actually damaged merchandise or merchandise sold upon the complete final liquidation of any business or merchandise donated for charitable purposes or to unemployment relief agencies. But to do this, the retailer had to put a strip label inside the cigar box stating the reason for selling below the code price.

8. Retailers could not sell below the code price indirectly by giving premiums with cigars sold at the minimum price. Packs of matches were the exception to this rule, but the giving of them was restricted, as mentioned above.

9. If a manufacturer changed his retail price or any of his discounts on file with the Council, the new prices or discounts became effective immediately, but dealers with stocks on hand at the time were privileged to dispose of these at the previous code minimum price.(*)

The original basis for the Cigar Merchandising Plan was the custom of cigar manufacturers to declare the intended retail prices of their products. Cigars naturally fell into certain categories such as the 5¢ cigar, the 10¢ cigar. Furthermore, the Bureau of Internal Revenue taxed cigars on the manufacturer's intended retail price. The cigar manufacturer, during the depression, caught between a rising cost of tobacco and a decreasing demand for his product, offered larger and larger discounts to retailers to promote the sale of his cigars. Makers of hand-made cigars, especially, offered large discounts to induce retailers to promote their goods instead of machine-made cigars with cheaper production costs. The result was that manufacturers of hand-made cigars had cut wages, and manufacturers of machine-made cigars had cut employees. In the retail branch of the trade, the fact that discounts to large and small retailers were unequal led to price cutting, causing the small merchant to clamor for price maintenance. The manufacturer was not in favor of price cutting, since it diminished the apparent value of his product in the minds of consumers and made them think it

---

(*) See Schedule I, Code of Fair Competition for the Retail Tobacco Trade.

was inferior in quality. The Cigar Merchandising Plan was an attempt to solve all of these problems.

The Plan ran into difficulties of administration after its approval. One retailer in Missouri secured an injunction against its enforcement in that state, and from many places throughout the country came consumer complaints based on the fact that the minimum quantity prices to consumers (i.e., in lots of 10 or more cigars) were higher than the previously prevailing retail prices. This caused a decline in the consumption of 10¢ and higher priced cigars. Furthermore, difficulties arose in the technical administration of the plan. For example, the tax provision in some states raised the price of a 5¢ cigar to 6¢, resulting in immediate consumer resistance. Some manufacturers refused to comply with the plan at all. Efforts to revise it resulted in disagreement among the three branches of the industry, and when a proposed modification finally emerged from the discussions, the Schechter Decision intervened before NRA could hold a hearing on it. (*)

The code provision applicable to the sale of cigarettes was simpler and seemed to achieve a much greater degree of compliance throughout the country than the Cigar Merchandising Plan. Apparently it met with the approval of practically all members of the trade, and derived aid from a favorable decision in the Philadelphia courts. The basis of the provision was the manufacturers' list price, a price existing by long custom in the trade and amounting to $6.10 per thousand in the case of the four popular brands of cigarettes. Cigarette manufacturers customarily allowed their direct customers (wholesalers and a few retailers) a discount from the list price of 10% plus 2% more for cash, making the cost to these dealers $1.076 per carton. Smaller retailers buying from wholesalers paid an average of $1.11 per carton. Because stores not dependent on the sale of tobacco products used cigarettes as loss leaders, the price sometimes descended as low as 90¢ per carton, and a frequent cut price was $1.00 per carton. Tobacco retailers, therefore, urged upon NRA the need for some form of price protection.

The provision first appearing in the approved code allowed the fixing of minimum prices only in the event of an emergency. (**) Less than one month after the approval of the code, the code authority prevailed on NRA to declare the existence of such an emergency and to fix the minimum prices of cigarettes, in substance, at the following markups above the manufacturer's list price:

5 1/4% when the list price was less than $5.00 per thousand, and 6 1/2% when thelist price was over $5.00. On sales of more than one package, amounting to a total of 20¢ to $1.00, the retailer could deduct 5% from the minimum price, and on sales of more than $1.00, a discount of 8%. This made the minimum prices on popular grands 13¢ per package, two packages for 25¢, and $1.00 per carton; and on the 10¢ brands, 10¢ per package, two for 19¢, and 95¢ per carton. The emergency order remained in effect for 90 days, being amended during that time in several particulars, one amendment requiring retailers to add the stamp tax to the minimum price in states with stamp tax laws.

(*) Source for above discussion: Preliminary History of the Retail Tobacco Code, prepared by Oliver F. Wadsworth, Assistant Deputy Administrator.

(**) Part II of Article VI of the Code.

At the end of the 90 day period, NRA extended the emergency order for another 90 days; and then again for 90 days more. Finally, in the spring of 1935, the trade proposed making the emergency order permanent, and after a hearing, NRA did this by a code amendment.

Though the emergency price provision of the code covered chewing tobacco, smoking tobacco and snuff, as well as cigarettes, NRA never declared an emergency with respect to the former products and did not include them in the new amendment. (*)

Both the Cigar Merchandising Plan and the Minimum cigarette price provision in the Retail Tobacco Code were somewhat similar to the loss limitation provision of the Retail Drug Code in their construction. Both were based on a manufacturer's list price rather than on the invoice cost of the retail dealer. However, the drug provision begged minimum prices, at the manufacturer's wholesale list price per dozen, a price almost equal to the small dealer's merchandise cost, while the minimum price under the Cigar Plan was the manufacturer's full retail price, considerably above the small dealer's cost, and the price under the cigarette provision, though based on a price comparable to the manufacturer's wholesale list, was from 5 1/4 to 6 1/2 per cent above that price (and about 13 above the average small dealer's cost of 11.1¢ per package). Thus both of the Tobacco Code provisions allowed a higher degree of price protection to the small dealer than the Drug Code provision. The Cigar Plan seemed less enforceable and less effective from a practical viewpoint than the Drug provision, while the cigarette clause, probably because of its popularity in the trade and the fact that it covered relatively few items, was apparently more enforceable and effective.

(*) Source for above discussion: Preliminary History of Retail Tobacco Trade.

II. THE RETAIL BOOKSELLER'S CODE

The Retail Booksellers' Code, like the Retail Drug Code, was supplementary to the Retail Trade Code, having separate provisions and a separate code authority. Until NRA approved their supplementary code on April 13, 1934, the booksellers operated entirely under the Retail Trade Code and under its loss limitation provision based on individual invoice cost.* Their trade leaders contended that this provision was no protection to small booksellers who were troubled with loss leader selling by department stores. In fact, they claimed, the department stores had come to regard the Retail Code minimum price as the maximum and thus had cut prices even lower than before NRA. Consequently the booksellers urged NRA to grant them either a separate code or a supplementary code with a higher degree of price protection.

Proponents of price protection argued that the department stores used their entire book departments as loss leaders, recouping their losses in other parts of their stores; and that the small booksellers, having no other items to sell, suffered accordingly. They stated that department stores handled only the fast-selling, popular books, leaving the slow-moving volumes to the small dealers who could not make enough profit on these alone.

The proponents argued that the department stores could not and would not handle the book needs of the nation if the small dealers went out of business, and that the country's cultural life would suffer in consequence. This last argument found support from a number of publishers.

An argument that, perhaps, impressed NRA more than any other was that price cutting by a few large department stores was causing an actual decrease in the volume of distribution of new books. Small dealers, fearing price cutting on a book highly advertised in advance of its issuance, sometimes refused to handle it or ordered only one or two copies. This practice, according to the proponents, reacted on the publishers to the extent of deterring them from publishing some books where there was danger of them becoming loss leaders.

To show that the department store was the principal source of competition, the proponents introduced the following percentage volume figures on the sale of books throughout the country:

48% by book stores.
29% by department stores.
7% by circulating libraries.
5% by drug stores.
11% by other outlets.

---

* Not until April 5, 1934, did NRA add a 10% labor mark-up to invoice cost.

By far the principal problems of the trade were concentrated in New York City where, according to evidence received at the public hearing, book sales represented 30% of the national volume; and on some particular books, as much as 50% of the national volume.

Apparently not daunted by the existence of NRA policy against most forms of price control, the small book-sellers demanded full resale price maintenance in the form of a clause prohibiting the sale of any book below the publisher's published price. Such a proposal met with opposition both within and outside of NRA. The Consumers' Advisory Board and Research and Planning Division within NRA objected strongly to the approval of any full price maintenance clause; and, outside NRA, the department stores, represented largely by the National Retail Dry Goods Association, fought the proposal on the ground that it was uneconomic and gave publishers too much power to gouge the consumer or the dealer. Book clubs and subscription mail order houses admitted that the clause was a good one for the small bookseller, but did not want it to apply to themselves.

The clause finally approved was, in substance, as follows:*

1. With certain exceptions (listed below) no bookseller could sell or offer for sale below the publisher's published price any book during the first six months after its publication, provided that if the book were published before July 1st of any year, the period of price maintenance extended until January 1st of the next year.

2. After the end of the full price maintenance period specified above, no bookseller could sell any book below his invoice cost plus 10%, in accordance with the Retail Trade Code loss limitation provision.

3. Exceptions:

   (a) Books could be sold below the cost price as bona fide clearance or if actually discontinued, but before a dealer could make such a sale during the full price maintenance period, he had to offer the books back to his supplier at invoice cost. Other exceptions were damaged books and books sold on the complete final liquidation of any business.

   (b) Books could be sold below the code price to public libraries and school and college libraries and similar institutions, but the code authority, with the approval of the Administrator, had power to

---

* Section 3, Retail Booksellers' Code.

stipulate maximum discounts to such institutions(*)

(c) Sales to State government or their subdivisions, covered by state law, were excepted from the code price.

(d) Sales to employees of the bookseller for the employees' own use were excepted.

(e) Dealers could sell bona fide publishers' remainders below the code price; but this exception did not apply to books manufactured especially for reminder sale.

(d) Legally appointed receivers or referees could sell below the code price to liquidate a business.

The approved clause was a compromise, meeting the approval of the Consumers' Adviser. Its purpose was to protect prices for the benefit of small booksellers during the initial period of consumer demand after the publication of the book; and also to protect prices during one Christmas season. Surveys of the book industry had revealed that the greatest public demand for books materialized in the first four or five months after publication, and also at the first Christmas season after publication. Testimony at the hearing had also shown that department stores used as loss leaders mostly new books, and cut prices on them principally during this period of initial demand. As stated before, small booksellers, because of this loss leader selling, sometimes refused to handle or handled only one or two copies of certain new books during this period. Thus the publisher and the consumer lost the benefit of wide distribution of the product during its most logical selling period. By completely eliminating price cutting during the first six months after publication and during the first Christmas season, the framers of the code hoped not only to protect small booksellers, but also to protect the publisher's volume of distribution and eliminate his fear of publishing popular books. The clause permitted price cutting down to cost plus 10% after the period of initial demand was over, but by that time small dealers had been able to sell many books, the publisher had gone safely through his best distribution period, and the value of the book to department stores as a loss leader had dwindled substantially.

Because opponents of price maintenance had warned that publishers might manipulate their prices so as to gouge the consumer, or manipulate their discounts so as to reduce the margin of retailers, the approved code contained a clause setting up a Price Control Committee consisting of a nominee of the Consumers' Advisory Board of NRA, a member of the Booksellers' Code Authority, a member of the Publishers' Code Authority, and a member of the Authors' Guild of the Authors' League. This committee's function was to investigate and report to NRA any instance of price or discount manipulation by publishers. If NRA found that the publisher had unwarrantedly increased his price or decreased his discount, it had power

(*) The code authority presented a list of such discounts to NRA for approval, but a public hearing on the subject produced so much opposition from liberries, that the code authority withdrew its request, and no maximum ciscounts were ever fixed during the life of the code.

to suspend the price provisions as to the offending book.* Records do not show any instance where the committee took action.

The booksellers' trade, with the exception of department stores and others who had opposed price maintenance, were enthusiastic over the code price provision. Apparently the opponents complied with it despite their objections, for NRA records contain only three instances of violation, and all three were minor and quickly adjusted without dispute.

After the clause had been in operation for about nine months, the code authority sent a questionnaire to 47 publishers asking them if their sales volume had increased or decreased under the price provision. Of 31 replies, only one showed a decrease in volume, and that was only 4%. The rest showed increases ranging from .004% to 180%; and the code authority estimated an increase of about 15% in the total book volume of the country. The department stores lost part of their volume by a shift of customers to small booksellers.**

The price provision in the Booksellers' Code, like that in the Retail Tobacco Code, was comparable to the loss limitation provision of the Retail Drug Code in that its basis was a fixed price, established by the manufacturer. However, the Booksellers' Code established a much higher minimum code price in relation to the small dealer's cost than did the Drug Code, and it is hardly probable that any prices decreased under the Booksellers' Code as they did under the Drug Code. The figures showing that publishers' sales volumes increased under the Booksellers' provision are interesting and suggest the desirability of obtaining similar figures for drug and cosmetic products.

---

* Section 4, paragraph 2, Booksellers' Code.

** Source for above discussion: Approved History of the Retail Booksellers' Code.

III. The Retail Food And Grocery Code

The loss limitation provision of the Retail Food and Grocery Code was entirely different from that in the Retail Drug Code, having its basis in the individual grocer's merchandise cost instead of a fixed price established by the manufacturer. In the approved code, the clause provided, in substance, as follows:*

1. No grocer could sell below cost plus a percentage to cover labor expenses to be established by NRA and the code authority.**

2. "Cost" meant invoice or replacement cost, whichever was lower, after deduction of all legitimate trade discounts exclusive of cash discounts for prompt payment.

3. Cost also included transportation charges to the point of sale, when paid by the merchant, except transportation charges on hauls of less than 25 miles.***

4. A merchant could meet the price of a competitor on merchandise identical or essentially the same, if the competitor's price conformed with the code; but the merchant who took such action had to notify his nearest local code authority.****

(*) Article VIII of the Retail Food and Grocery Code.

(**) The labor mark-up was established at 6%, but not until almost 3 months after the approval of the code.

(***) This provision was amended twice, putting these charges, finally, on a zone basis.

(****) NRA later amended this provision so that a merchant could meet competition on merchandise which was "the same as to comparable competitive factors, such as weight, quantity, quality, pack and/or brand or packaging" if the competitor's price conformed with the code governing the sale of such product. The requirement of reporting to the local code authority remained the same.

In negotiating for a code, grocers had argued that price cutting in their trade was injuring the small dealer in much the same way as in other trades. In the grocery trade, however, the original code effort was toward a vertical Master Food Code covering manufacturers, wholesalers and retailers and establishing inter-related trade practices governing all three classes. The proposed provisions submitted to the Agricultural Adjustment Administration* prohibited manufacturers from selling below production cost plus a reasonable distribution charge, and prohibited wholesalers from selling below the prevailing market cost f.o.b. the wholesaler's place of business, plus a mark-up of 2½%. The provision relating to retailers prohibited sales below invoice cost on goods bought within 30 days of the date of sale, and replacement cost on goods bought previously, with the addition of a 7½% mark-up in both cases. Transportation charges to the point of sale were a part of cost. Where a retailer bought directly from the manufacturer his total mark-up had to be 10% (7½% retail mark-up plus 2½% wholesale mark-up).

Though the food industry did not receive its single master code, the retail grocers achieved, in their approved code, at least the fundamentals of the loss limitation provision they requested. The approved code reduced the requested mark-up to 6%, and eliminate the provision that invoice cost remained the code price base for only 30 days after the purchase of the goods. The grocers accepted without too much objection the reduction in their mark-up, but throughout the entire code period fought to change the definition of cost to accord with their original proposal. Under the definition in the approved code, a large retailer, buying on a rising market could stock heavily and, so long as his stock lasted, sell at a code price equal to his original invoice cost plus 6%. Under the original Master Food Code proposal, such a store, after 30 days, would have been forced to raise its price to replacement cost plus the mark-up. Such an arrangement would have benefitted small grocers who could not afford to buy heavily in anticipation of market price advances. Another difference between the approved code and the proposed Master Food Code was the failure of the former to require those retailers who bought directly from manufacturers to add the wholesale as well as the retail mark-up. The approved Wholesale Food and Grocery Code required wholesalers to add a 2% mark-up to their costs in determining the code minimum price, but this clause applied only to those enterprises qualifying under the definition of a wholesaler. NRA ruled that grocery chains performing a distributing function to their several units were both wholesalers and retailers and had to add both 2% and 6% to their invoice costs; but this rule could not apply to large independents with only one store who bought directly from manufacturers but did not distribute to other retailers. The result was that, whenever a trading area contained such a large independent, the code minimum price was 2% lower than it would have been under the Master Food Code proposal. Such an independent enjoyed no actual price advantage, since other retailers could meet his prices, but the code minimum price descended even further below the small dealer's merchandise cost.

(*) During the early period of code making, the AAA had jurisdiction over the trade practice provisions of all food codes and NRA had jurisdiction over their labor provisions.

The approved Food and Grocery Loss Limitation Provision had a number of inherent limitations, and its administration was consequently troublesome. In the first place, the code price was not a fixed or certain amount on each item, but depended on what the particular dealer had paid for his goods. The only way compliance officers could determine this fact was to examine the invoices of the dealer, and if he refused to show them there was no means to compel him. NRA sometimes approached the dealer's supplier for such information, and though some were willing to divulge it, others refused to do so for fear of causing the dealer trouble. There was ample opportunity for dealers to manufacture invoices to suit their purposes or to use old invoices, contending that they represented the stock on hand when in fact that stock had been replaced long before at a higher price.

The clause permitting merchants to meet prices of competitors also caused trouble; for, though it permitted them in theory to meet only prices conforming to the code, there was no way for the merchant desiring to meet a price to determine whether it conformed or not.

Administrative difficulties with clearance sales, premiums and prize contests* under this code were similar to those under the Retail Drug Code. Another difficulty arose from the practice of grocery manufacturers in giving free goods to retailers. Since, technically, these goods cost the retailer nothing he could give them free to the consumer if he chose, and this situation formed a loophole for price cutters.

The office of the deputy administering this code claimed that the trade complied voluntarily with the loss limitation provision to a substantial extent; and that the large chains tried in good faith to abide by it. In spite of this, however, there were so many stores and items involved that many complaints of violations undiscovered. Seven cases under the loss limitation provision of this code went to NRA's litigation division for court action; and of these, the Division dropped five. Of the remaining two, the Litigation Division obtained a consent decree in one and lost the other on demurrer in court.**

(*) The Food and Grocery Code contained a "clearance sale and premium clause similar to the one in the Retail Drug Code. See Chapter III of this Part - Page 38

(**) Source for above discussion: Report of Howard Jaffee, one-time Aide to the Deputy Administrator of Retail Food & Grocery Code. Mr. Jaffee made a detailed examination of the Deputy's files on the code.

The loss limitation provision in the Retail Food and Grocery Code was unlike that in the Retail Drug Code in two major respects; first, because its code minimum price was a shifting figure based on invoice cost, rather than on the manufacturer's list price, and second, because its invoice cost basis was lower than the invoice cost of the small dealer. Ineffect, since all dealers could meet competitors' prices, the Food and Grocery provision established a code minimum price equal to the lowest invoice cost in each trading area, plus 6%. Thus the clause did not protect the small grocer from selling below his merchandise cost and granted him much less protection than the Drug Code provision. The Food and Grocery provision probably did to some extent stop extremely low price cutting. It appears, however, that there was no means available for establishing definite, and non-fluctuating code prices in the grocery trade as in the drug, tobacco and booksellers' trades. Grocery manufacturers apparently did not sell on the basis of a list price as did manufacturers in these other trades, and prices of staple foodstuffs were inherently subject to fluctuation.

IV. Retail Trade Code

The loss limitation provision of the Retail Trade Code was fundamentally similar to that in the Food and Grocery Code, the wording in the two codes being almost identical. Until the druggists obtained approval of their March amendment they had operated under the Retail Trade loss limitation provision and, as stated in Chapter III of this Part, had found it very unsatisfactory in point of both enforcement and price protection to small dealers. The approved clause provided, in substance, as follows:*

1. Retailers could not sell at less than their net invoice or replacement cost, whichever was lower, after the deduction of all legitimate trade discounts exclusive of cash discounts, plus a mark-up to be fixed later by NRA.**

2. A merchant could meet the price of his competitor if the competitor's price conformed to the code and the merchant notified his local code authority.

(*) Article VIII, Sec. 1 of Retail Trade Code. Sec. 2 of same Article provided for clearance sales and other occasions for sale of goods below the code minimum. Since Sec. 2 covered the retail drug trade and was quoted and discussed in Chapter III of this Part, it is not repeated here. See Page 158

(**) The mark-up was fixed at 10% but not until 8½ months after the code's approval

There is no evidence relating to the effects or effectiveness of this provision. The trade seemed to consider it a relatively unimportant part of their code in contradistinction to the importance, to the respective trades, of the loss limitation provisions in the Retail Drug, Retail Tobacco, Retail book-sellers' and Retail Food and Grocery Codes. The clause like that of the Retail Food and Grocery Code, had elements of unenforceability, difficulty of ascertainment of code price, and a price standard lower than small dealer's merchandise cost. It may have acted as a limitation upon extremely low prices but even this result is not certain, since there is no revealing record of the degree of compliance;

(*) Lack of information prevents a more detailed description of this loss limitation provision. However, the efforts of druggists to work under it for several months before they obtained their own provisions appear from the discussion in Chapter III of this Part. The source of information for the above discussion is History of Retail Trade Code and the experience of members of the Unit who had an active association with those administering this code.

PART III (A)

STATE RESALE PRICE MAINTENANCE LAWS *

Chapter I. The Fair Trade Laws

I. Contracts

Resale price maintenance by contract is now legal in ten states. During the five months from March to July, 1935, nine states passed laws modeled after the California Act. The chronology of Fair Trade Law enactment follows: California, passed 1931, amended May, 1935; passed in March, 1935, New Jersey, Oregon, Washington; May, 1935, Iowa, Maryland, New York, Wisconsin; June, 1935, Pennsylvania; July, 1935, Illinois.

The following sixteen states considered resale price maintenance legislation during 1935, but the attempts at enactment were unsuccessful: Alabama, Arizona 1/, Colorado, Connecticut 2/, Indiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming 3/. The bills introduced in Missouri and Minnesota proposed a resale price maintenance procedure known as the Fitch Plan 4/ which differs somewhat from the bills which have been passed. A bill is pending in the Ohio legislature.

Bills are to be introduced in the following four legislatures now in session; Massachusetts, Mississippi, South Carolina and Virginia. The bill that died in the 1935 legislature was reintroduced in the special session of the Minnesota State Legislature. After passing in the House it died when the session ended. The Drug Associations of the seven following states--Alabama, Colorado, Indiana, Missouri, Oklahoma, Tennessee and Utah--declared at their conventions their intent to reintroduce Fair Trade bills as soon as their state legislatures convened, since such legislation had been defeated in the 1935 legislatures.

The Druggists' Associations of five other states have resolved to introduce fair trade legislation at the first opportunity. This is the first time that such bills are to be proposed in the following states--Florida, Georgia, North Carolina, Texas, and West Virginia.

1/ Passed by both Houses, vetoed by the Governor.

2/ Connecticut enacted the Retail Control Bill after voting down the Fair Trade Bills.

3/ The Alabama Bill and the amended Tennessee Bill died with the adjournment of the Legislatures.

4/ See Appendix, page 388 for text of the Fitch Control Plan.

* Prepared by H. S. Kantor and Anne Golden

Nine of the ten Fair Trade Laws now in effect are practically identical. The Illinois 1/ and Washington 2/ laws differ slightly. The Wisconsin law contains all of the provisions of the California law, and an additional section, the intent of which is to protect the consumer against "unreasonable prices."

The Fair Trade laws all provide for contracts between the producer 3/ and a reseller of a branded product, wherein the price at which the product is to be sold is definitely fixed. The vendee in the first instance may recontract with subsequent purchasers for resale, so that the producer is given the right to fix the prices which the consumer pays for the product. If the price of a product is set in such contract, selling it or advertising it for sale at a lower price is actionable by anyone injured thereby, whether or not the price-cutter is party to the resale contract. 4/

Monopoly or restraint of trade by means of resale price contracts is guarded against in all of the laws now in effect. Such contracts may be entered into only on products that are in "fair and open competition with other products of the same class made by others." Furthermore, horizontal agreements are expressly prohibited. Contracts may not be written between producers, between wholesalers or between retailers.

The Wisconsin law provides for the review of prices set in resale contracts, by the Department of Agriculture and Markets, which has the power of cancelling the contract under the following circumstances:

1/ The Illinois law provides for 10 day notice to the manufacturer or primary vendor, by vendee before liquidating his stock according to the exceptions permitted. These are the same as in the other states.

2/ The Washington Law is an emergency measure expiring July, 1937.

3/ With the exception of Wisconsin which does not include publisher, the Fair Trade Laws define "producer" as grower, baker, maker, manufacturer and publisher. (The Illinois law does not include any definition of "producer.")

4/ It is to be noted, however, that proceeding against a price-cutter who is not party to a contract is much more difficult, in view of the fact that most contracts set a fixed sum as liquidated damage for violation of contract. Proof and evaluation of damage may be difficult in the court action necessary in case of violation by non-parties. This provision may also be more vulnerable to attack on constitutional grounds than the provision governing conduct of parties to contracts.

(Subsection 7 (a), Wisconsin 113,25)

> "(7) (a) Upon complaint of any person that any contract containing the provisions referred to in Subsection (3) is unfair and unreasonable as to the minimum resale price therein stipulated, the Department of Agriculture and Markets may in its discretion serve by registered mail upon the parties to said contract notice of the time and place for a hearing on said complaint, at which hearing said parties shall show cause why the said contract should not be set aside. If upon such hearing the Department of Agriculture and Markets shall find that such contract is unfair and unreasonable as to its minimum resale price provisions, said Department may by special order declare such contract to be in restraint of trade."

While the other laws provide only for remedy in case of violation of a contract price, the Wisconsin law makes it possible for anyone to complain against the "unfairness and unreasonableness" of the price itself, to a body with definite authorization to set the price aside if it so decides after due consideration. Thus, Wisconsin alone gives the consumer a direct remedy for high prices, in the event that competition fails to operate freely, or brings about price adjustment very slowly. Under the other nine laws competition among manufacturers,--those making branded goods, and this whole class competing with makers of unbranded or "private brand" goods--is relied on to safeguard the consumer.

All of the Fair Trade Laws permit resale at less than contract price for clearance, foreclosure or other conditions of distress. The Illinois law alone requires the seller to give ten days notice to the manufacturer, before selling at the reduced price. It is to be noted that purchasers who buy at distress sales and resell under normal business conditions are fully bound by resale prices set in contracts outstanding in the state in which they sell.

The Fair Trade Laws now in effect provide for exact stipulation of price, not for the setting of a minimum price. The text of the Wisconsin statute includes comment on the fairness of the "minimum resale price therein stipulated." The contracts, however, are permitted to set the "price at which" the product is resold. 1/ Sale at higher prices is not specifically treated in any of the laws, and the extent

---

1/ H. R. 11, 72nd Congress, 1st Session (The Capper-Kelly Bill of 1931) permitted contracting for resale at "price or prices stipulated." The Oregon law of March 9, 1933, repealed in 1935 with the passage of the new Fair Trade Law, permitted setting more than one minimum price in resale price contracts. Such provisions allow setting "ordinary" prices and "special" prices on articles under contract. It is to be noted also that the repealed Oregon law permitted sale at more than the stipulated prices.

to which prices will be absolutely uniform on products for which contracts are written is therefore not absolutely clear. There is the presumption, of course, that on popular items competition will be so severe as to prevent any retailer from securing a price above the contract price. A retailer interested in switching a substitute product might well use even a slight mark-up over the contract price to facilitate the switch. This applies only to retailers who are not parties to the controlling contract, and may be possibility "on paper" only. 1/

Difficulties may arise in the interpretation of the Fair Trade Laws. Section I of the Law read in part as follows: (The California Law is used here as example. The others are practically identical with it in the section quoted; the Illinois, Washington, and Wisconsin laws differ slightly from the other laws in wording):

"Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee."

The laws define "producers" but do not define "owner". The latter was probably included to cover: complex products, parts of which are made for the branding company; products made in their entirely for the owner of a brand-name; products made for a company which has intensively advertised its firm-name.

The problem is, whether or not anyone who has acquired title is permitted to write the contract setting the resale price. This question arises because the law does not say "no contract between a producer and his vendee relating to...." 2/ but says simply "no contract relating to.."

1/ Some contracting parties may, of course, attempt writing contracts in which the stipulated price is called the "minimum resale price."

2/ The repealed Oregon Law did so specify; the new Oregon Law does not. The argument that the change evidences intent of the legislature to change the preceding status does not hold, because the old law was precise and the new one is vague. If the legislature meant to leave the way open for practices not contemplated in the repealed law, it should have stated that fact by defining the new condition. If discretionary power were to be granted to those administering the law, that fact should be stated, and the extent of the discretion defined.

> It appears rather that the Oregon Law was replaced in order to remove the difficult conditions circumscribing procedure for redress in the old law, and to achieve uniformity with the California law, which was currently accepted as the model. Even the grammatically peculiar wording of Subsection 2 was copied. The old Oregon Law states: "2 That the vendee or producer require any dealer to whom he may resell such commodity to agree...." In the new law, the words "in delivery", are substituted for, "any dealer" exactly as in the California law--leaving, "to agree", without any subject.

The wording appears to allow the initiating of contracts on any product which meets the stated requirements.

If, in place of the words "the vendor" (line 10) the law read "a vendor" or "the first vendor to make such stipulation of a resale contract" the meaning would be absolutely clear. If the words "the vendor" are so interpreted, it is clearly possible for anyone holding title to write a resale price maintenance contract on the product, provided the product itself meets the requirements of the law, and provided no one else has yet written a contract on it in the state. Obviously, in no case could contracts setting different prices for the same product be written in a single Fair Trade state: the price set in the first contract written would govern. However, if the producer, or the owner of the name by which the product is identified, has no desire to set the retail price and has therefore not written a resale price maintenance contract, it may be possible for any wholesaler in the states who has bought some of the product, to get the retail price for the whole state by writing a contract with any retailer.

A producer opposed to resale price maintenance could break such an attempt only at considerable expense, namely, by opening retail stores in the state. This would involve not only state incorporation of the company, but might include difficulties as to powers granted in the company's charter. Furthermore, even protesting, without actually offering competiting retail sales, would obviously put the producer on record as an opponent of resale price maintenance. Undoubtedly, some companies which are opposed do not wish to make a public and unequivocal statement of their views.

The foregoing interpretation of the Fair Trade Laws would also cover the action of wholesalers in originating resale price maintenance contracts for out-of-state producers. The producer has the right to suggest a resale price, although he cannot enforce it except by refusal-to-sell. If the wholesaler decides to write the suggested price into a contract with a retailer, it becomes the stipulated, enforceable price under the Fair Trade Law. This interpretation of the permission granted in the Law is very favorable to the wholesaler, because it obviates, for the producer, the expensive alternative procedures of state incorporation and direct contracts with retailers. Since the producer wholesaler link is informal, the producer's position in this set-up does not have firm legal foundation.

If the definition of "the vendor" is any vendor or the first vendor in the state, the preceding remarks hold. If "the vendor" is the first vendor of the product in its identified, marketable form, they do not. Since the producer is not a reseller, "he" (3rd word, line 12) refers to the producer's (or "vendor's", line 10) vendee. If the phrase "in turn" modifies the phrase "resell except at the price stipulated", a precedent stipulation is implied. This could be contained only in the contract between producer and his vendee. The distinction made in the words "vendee or producer" (line 11) and the use of the phrase "by such vendor or by such vendee" (lines 13 and 14) appear further to identify "producer" and "the vendor" of line 10. The presumption therefore is that the producer is party to the first contract. The only case in which the producer need not be party to it is that in which the producer is not named on the product--that is, he is anonymous as far as the consumer is concerned. In this case the product lies within the scope of the Fair Trade Laws only if the name of the owner is on it. The owner is, then, the first vendor of the product in identified form and under the name by which it is publicly known.

The presence of both producer's and owner's name on the product would not clearly give either one the right to initiate resale price maintenance contracts. The act says "name of the producer or owner", indicating that one or the other would ordinarily take precedence as being the known and established name: the one whose name is intimately connected with the product initiates the resale price maintenance contract.

The choice offered in lines 10 - 14 is this: the producer's vendee may re-contract with his own vendee, even if the producer does not require him to do so; and the producer's vendee may set the next resale price if the producer has not already set it. Since ordinarily the producer will set the retail price, the alternative is probably not important. It would give the producer control of dealer's margin but not of retail price. This might easily involve difficulties if the producer sold through more than one channel of distribution.

In conclusion, it may be said that the greater probability attaches to the interpretation of the Fair Trade Laws as permitting initiation of resale price maintenance contracts only by the producer or by the owner of the name by which the product is known. Decision rests with the courts. 1/

II. Types of Resale Price Maintenance Contract.

Resale price maintenance contracts now in use are of three general types. These are: (a) a contract between a manufacturer (or other producer) and a retailer covering one or more products of the manufacturer: (b) a contract between a wholesaler and a retailer covering one or more of the products of a single manufacturer: (c) a contract between a wholesaler and a retailer covering all of the price maintained merchandise sold by the wholesaler to the retailer, and including the products of one or more manufacturers.

1/ Pending court tests do not involve the question of who may initiate a contract
point.

The first type affords the direct selling manufacturer control over the price paid by the consumer, and may tend to encourage direct sales to retailers. This type of contract involves the greatest expense for the manufacturer. Before he can write individual contracts with retailers, he must incorporate within the state. This involves additional taxes and incorporation fees, besides the added bookkeeping costs. Even with the state incorporation of a selling company, there is danger that the Federal Court will declare the price contracts to be in restraint of trade.

The other two types of contract retain for the wholesaler his place in the distribution system and may be expected to exercise an influence against rapid change from wholesaler selling to direct selling by the manufacturer. Type (c), popularly known as the "omnibus contract," may give rise to difficulties if the competing products of several manufacturers are included in a single contract. The Fair Trade Laws require that the product which is the subject of contract be in "fair and open competition with products in the same general class produced by others." Situations may arise in which an omnibus contract is regarded as tending to restrict competition through the inclusion in the same contract of competing products made by several manufacturers. Wholesalers are urging manufacturers to use the omnibus contract in order to avoid the expense and red tape of incorporating and of writing many separate contracts with retailers. 1/ This type of contract, of course, is most important to the wholesaler as a means of strengthening his changing position in the distribution system.

More serious obstacles to price maintenance through wholesalers by producers outside the state are those of authorization and jurisdiction. 2/ If the contract is between parties of diverse citizenship, it is directly in interstate commerce. 3/ Only if the wholesaling firm is agent for the producer, or if the producer incorporates in the state, is the first contract within the scope of the state Fair Trade Law. Despite the costs, many manufacturers have already incorporated selling companies in the state of California, in order to have the first contract on their products one between parties with California citizenship. While the number of state incorporations is much smaller in the states which have more recently enacted resale price maintenance legislation, it appears to

---

1/ Drug Trade News, July 8, 1935. Page 30

2/ States have been neither uniform nor self-consistent in deciding what constitutes intrastate commerce.

3/ Lawyers will perhaps argue whether or not the action under the contract is performed within one of the states. State court decision on the intrastate character of a transaction is subject to review by federal court.

be increasing rapidly. 1/ Manufacturers doing a national or regional business have the precedent of California's experience on which to decide their course of action. Incorporating in a large number of states involves expense for charters and may subject the company so doing to additional tax levies. For these reasons, and because the wholesaler can deal more directly with local retailers, manufacturers may be tempted to use omnibus contracts with wholesalers, hoping that a federal law will be enacted before any litigation arises on the question of interstate contracts.

III. Administration of the Fair Trade Laws

In order to avoid prolonged argument on the evaluation of injury, all the types of contracts now being written provide for the payment of liquidated damages for proved violation of a contract price. Retail druggists in a number of localities are planning to maintain funds, by contribution, for legal expenses. They expect wholesalers and manufacturers to contribute to these funds. 2/ Drug retailers admit freely that they are the principal beneficiaries of resale price maintenance, and recognize that manufacturers might be unwilling to proceed against violators if the price-cutting continued on any significant scale in defiance of outstanding contracts, requiring large outlay for policing and litigation.

One association of retail druggists has already established a policing committee, which is expected to spend all of its time checking up on the support of a number of prominent drug manufacturers, and more specifically, has secured their promise of contributions toward the expenses of the committee. The letter of the association to these manufacturers, mentions the expenses, suggests the contribution, and carries the thinly veiled threat of including in their policing functions that of seeing that the manufacturers' products "are not put under the counter and forgotten." 3/ Chain stores are also participating in the policing, and are contributing to the expenses.

IV. The Oregon Fair Trade Law of 1933

The Oregon Law of 1933 differed from the Fair Trade Laws now in effect in two respects. First: The contracts permitted under the law of 1933 were specifically stated to be contracts between producer and retailer, with optional intermediate contracts. Second: Sale at less than the price set in an outstanding contract was actionable by the producer only, rather than by an injured party; and it was actionable by the producer only on condition that he brought suit at the same time against all vendees of the commodity doing business within the county in which action was taken. This circumscription of redress made it

---

1/ Drug Trade News, Volume 10, Numbers 13, 13, and 14.

2/ Editorial "Cost of Using Fair Trade Contracts"--Drug Trade News, July 8, 1935, page 20.

3/ Southern California Retail Druggists Association. Ltd., has organized a policing department. Drug Trade News, July 8, 1935, page 6, col.3.

difficult for an injured manufacturer to proceed. The law did not even specify that only price-cutting vendees in the county were subject to suit. Its ineffectiveness is readily understandable.

V. The Fitch Plan

It should be noted that not all of the acts which failed to pass were identical with those now in effect. Minnesota and Missouri voted on an act embodying the so-called "Fitch-Plan". This provides for the filing of prices with the Secretary of State, instead of contracting with resellers, such filing to constitute notice on all resellers. The Fitch-Plan differs further from the Capper-Kelly Bill in that while any injured party may enjoin a violator, only the maker of the product is entitled to damages. This plan is more characteristically a manufacturer's plan. (The Fitch Company is prominent in the field of drug manufacturing.) The Fair Trade Laws indicate the retailer's interest more clearly by allowing damage suits by any injured party. The fact that the Fitch-Plan differs from those laws, probably served to lessen the support for the attempts at its enactment. (In Missouri, producer opposition to any form of resale price maintenance helped to defeat the bill.) The retail group lobbying for the Fair Trade Laws is endeavoring to secure the passage of uniform legislation.

CHAPTER II - OTHER LEGISLATION ON RESALE PRICE

I. NEW JERSEY

In 1913, New Jersey enacted a statute permitting resale price maintenance by notice under certain conditions.* The statute prohibited specified practices, if these were done "for the purpose of attracting trade for other goods." A manufacturer could therefore prevent the use of his product as a price leader by affixing to it a notice declaring such conditions as were covered in the law. The phrase quoted above was deleted in the amendment of 1915. This change made the law a general law permitting resale price maintenance by notice. Price cutting of any kind -- not merely loss leader selling -- could be prevented by the manufacturer of a product.

The law provided that violation of the terms contained in the notice was actionable by the manufacturer or other injured party. Damages could be awarded to the manufacturer, up to three times the loss sustained, at the discretion of the court. Award of damages to injured parties other than the manufacturer was not specified in the law.

The Robert H. Ingersoll and Bros. Company brought suit on two occasions under this law. In 1915, the Court of Chancery of the State of New Jersey** ruled against the Ingersoll Company on the ground that the notice was too broad, and that it forbade a sale to which the act had no application. Suit was brought under the 1913 form of the act. While the opinion rendered did not specify wherein the notice failed to meet the requirements of the act, it may be noted here that the Ingersoll Company's notice included, among others, the following statements:

1. That violation of any of the terms of the notice would render the violator liable to law suit for infringement of the patents covering the mechanism of the watch; and

2. That jobbers were not to sell to anyone "designated by the manufacturers as objectionable."

In 1917 the Ingersoll Company again brought suit.*** This time the Court of Chancery upheld the use of notice. The Court held:

---

* See Appendix, Page 357, for the 1913 Law, and Amendments of 1915 and 1916.

** Ingersoll v. Goldstein -- 93 St 193 (1915)

*** Ingersoll v. Hahn 101 At. 1030 (1917); 108 At. 128 (1918)

1. That the law in question was not repugnant to the Constitution of the United States or to that of the State of New Jersey.

2. That the statute was a proper enactment under the police power of the State, "promoting good morals in business."

3. That the statute did not interfere with interstate trade; and

4. That the revised notice was in conformity with the terms of the statute.

In neither of these two cases did the Court rule on the propriety of that part of the Ingersoll Company's notice which referred to intermediate sales: The company required all sales by wholesalers and jobbers to be made at prices stated in its schedules covering such transactions. These lists were not part of the notice attached to the package, and the enforceability of this requirement was therefore open to question. The defendants in both cases were retailers.

This law has been practically inoperative. It is likely to attract a good deal of attention now, in view of the strong current interest in resale price maintenance. It presents what appears to be a workable and economical alternative to the contracts authorized by the Fair Trade Laws.

II. CONNECTICUT

Connecticut voted down the proposed Fair Trade Act and shortly thereafter passed the Retail Drug Control Act which is the enactment in state law, of the fair trade practice provisions of the Retail Drug Code. (*) Drug retailers are again prohibited thereunder from selling any product covered by the former Code at less than the "manufacturer's wholesale list price in dozen lots". This is ordinarily higher than the actual net purchase price of the retailer, and is therefore a compromise between prohibition of sale below net cost and full resale price maintenance.

III IDAHO

Another type of legislation which has a direct connection with the problem of loss leader selling of which resale price maintenance is

---

(*) See Appendix, Page 58 , for text of the Connecticut Retail Drug Control Act.

one aspect, is the act introduced in Idaho. (*) This act proposed to prohibit the sale of unrelated lines in drug stores. While this act failed, and while the disruption it might cause in existing trade practices makes its passage highly unlikely, the solution it offers to the vexing question of loss leader selling across retail trades is not fantastic. This type of regulation was actually in effect in Cuba prior to the separation from the United States. It is an attack on sales of unrelated products by a retailer in any given field. The Cuban restriction was not limited to drugs, but included all retailing; no retailer was permitted to sell any product not covered by his franchise. (**)

The Idaho proposal was impractical but the idea it was based on -- prohibition of loss leader selling of unrelated lines -- is important. Many wholesalers have made attempts at securing such prohibition. Retailers find the problem very troublesome, especially in cases in which a retailer finds his whole line or a large part of it used as a loss leader department in a competing department store.

The Connecticut law treats loss leader selling on a much broader front than the Fair Trade Laws. It is not limited only to the use of branded products as price leaders. Bulk goods and unbranded goods of standard quality are often used in exactly the same way as well known branded merchandise, although much less commonly in drugs than in groceries. (***) Setting a price floor as is done in the Retail Drug Control Act, does not completely cut off price competition in distribution. The uniformity of price established by a resale price contract may actually be a handicap to the manufacturer in distributing his product. (****)

(*) March 18, 1935. "A bill was passed by the Senate here (Boise, Idaho) which prohibits pharmacies, dispensaries, drug stores, or apothecaries where drugs, medicines, chemicals or poisons are offered for sale to operate a soda fountain or restaurant, or sell newspapers, magazines, books, pictures, electrical equipment, jewelry, leather goods, plumbing fixtures, automobiles, automobile tires, radios, furniture, typewriters, wearing apparel, groceries, stationery, hardware, cigars, cigarettes, tobacco, candy, caskets for burial, vegetables, refrigerators, shoes, or shoe repairing." Drug Trade News, March 25, 1935, Notes under "Legislation."

(**) Seligman and Love "Price Cutting and Price Maintenance" -- Appendix , Page 302.

(***) Ibid. Appendix , prepared by Mr. Reavis Cox, page 303 et seq.

(****) As for geographic uniformity, prices set in resale price maintenance contracts need not be the same for all Fair Trade states. Zone prices are now used in a number of industries, and may be the practice under Fair Trade contracts.

Resale price maintenance limits price competition on products which are subjects of resale contracts, to the extent that only the maker may change the price. This makes it easier for a producer to gauge his market, but it may be expected to result in reduced flexibility in the price system. It must be remembered, of course, that the Fair Trade laws do not require contracts to be written, but are permissive only. Furthermore, the highly advertised branded goods -- on which resale price maintenance contracts are in greatest demand -- are in competition with readily available substitutes.

There is, of course, a large body of state laws on price now in effect. Anti-trust laws and laws against secret or discriminatory prices and discounts have been passed in many states during the past forty years. A number of states have passed legislation aimed at chain stores. These have not yet been analyzed from the standpoint of ascertaining the present status of price regulation in the states and for the country as a whole. The economic significance of each type of price regulating statute, the implications of independent state enactment in consideration of the widely varying degrees of interrelationship of local and national markets, and the postulates and mechanism of a unified price program require close thinking on a factual base.

PART III (B)

THE EXPERIENCE IN THE STATE OF CALIFORNIA

CHAPTER I

THE LEGAL HISTORY OF RESALE PRICE MAINTENANCE IN CALIFORNIA

California and Californians have long been famous for their willingness to experiment in numerous directions. The field of price stabilization is no exception to this general temper. In this review only those attempts that affect the sale of ordinary consumable goods at retail are to be examined; hence legislation in the agricultural field such as the prorate act is excluded. The legislative attempts to introduce stability into the price structure of goods sold at retail have assumed three general forms:

(1) the granting of the right of contract with respect to resale prices

(2) the prohibition of discrimination in pricing

(3) the prohibition of sales below cost.

I. THER PERIOD PRIOR TO THE 1931 FAIR TRADE STATUTE.

The Cartwright Act of 1907 is the anti-trust law of the State of California. It defined a "trust", and provided for criminal penalties and civil damages, and punishment of corporations, person, firms, and associations involved in trust agreements.(*) Among the arrangements among member of the trade specifically prohibited as of the quality of trusts were:

(1) Creating or carrying out restrictions in trade

(2) Limiting or reducing the price of merchandise

(3) Increasing or reducing the price of merchandise

(4) Preventing competition in manufacturing, transportation and sale of commodities

(5) Fixing any standard or figure whereby price to the public shall be controlled

(6) Making or entering into or executing or carrying out any contracts, obligations or agreements of any kind or description binding the parties not to sell an article of trade below a common standard figure or in any way keeping the price at a fixed or graduated figure.

(*) California Statutes 1907, Chapter 538.

The avowed purpose of the Act was to "promote free competition." Obviously, prohibitions of the sort listed above clearly made arrangements for resale price maintenance unlawful.

In 1909 the Cartwright Act was liberalized by an Amendment as follows:

> Sec. 1. Every such trust as is defined herein is declared to be unlawful, against public policy and void, provided that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further, that it shall not be deemed to be unlawful, or within the provision of this act, for persons, firms, or corporations, engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm, or corporation, having as its object or purpose the transportation, marketing or delivery of such commodities.
>
> Sec. 2. A new section is hereby added to said act to be numbered section 3½ and to read as follows:
>
> Sec. 3½. It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry, or which are in the furtherance of trade.
>
> Sec. 3. This shall take effect immediately. (*)

Twice, within three years following the passage of this Amendment, the Supreme Court of the State held that a manufacturer has the right to fix the resale price of his products. The first case was Grogan vs. Chaffee in 1909. Chaffee, the defendant, was a retail grocer in Pasadena who had purchased olive oil from Grogan, the plaintiff, under an express contract not to sell it below the price fixed by Grogan. Chaffee held the contract in restraint of trade and hence refused to abide by its terms. In its opinion, the California Supreme Court declared:

> "There is nothing unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained." (**)

(*) California Statutes 1909, Chapter 363

(**) California Reports, Volume 156, p. 611

The second case was Ghiradelli vs Hunsicker in 1912. This case is peculiarly significant because it involved a wholesale intermediary between the manufacturer and the retailer. Hunsicker, a retailer, had purchased Ghiradelli chocolate from a wholesaler. The Ghiradelli Company at the time attached a label to its product with the following notice:

"IMPORTANT NOTICE

"The grades contained in this case are sold on the express condition made a part of the consideration of the sale, whether same is made by the manufacturer or wholesaler, that the purchaser, if he retails them, will maintain our fixed retail price on these goods, and if he wholesales them he will do so subject to the same condition. The acceptance of these goods is an agreement not to retail them, under any circumstances for less than the established price.

"Our fixed minimum retail price on Ghiradelli Ground Chocolate for the Pacific Coast is 30¢ per 1 lb. tin and 80¢ per 3 lb. tin.

(Signed) D. Ghiradelli Company."

Hunsicker, the defendant, had full knowledge of this notice and purchased under this agreement, yet sold at prices below those stipulated. Hunsicker claimed that the Ghiradelli Company could not force him to maintain its prices because he did not deal with them directly. The Supreme Court, however, held otherwise, stating that a contract made expressly for the benefit of a third person may be enforced by him under Section 1559 of the Civil Code, provided the contract is enforceable. The Court held that this particular form of agreement was not unenforceable under the common-law or the Sherman Anti-Trust Act; likewise that it did not violate the Cartwright Act of the State since its object was to enable the manufacturer to conduct his business at a reasonable profit.(*)

Thus, in intra-state commerce resale price maintenance was lawful in California following the 1909 amendment to the Cartwright Act.

(*) 164 California 354

It is interesting to note the interpretation of the British Courts with respect to the rights of third parties to a contract in a case somewhat similar. In the case of Dunlop vs Selfridge in 1915, it was held that a manufacturer may have a right of action against a contracting wholesaler, but not against a sub-purchaser, even though he had contracted with the wholesaler. The action would lie with the wholesaler as the contracting party. In this case, however, there is the difference that the product did not contain the notice of the conditions of sale as in the Ghiradelli case, although the defendant had contracted with the wholesaler. For further details, see Grether, E. T., Resale Price Maintenance in Great Britain, P. 260.

II. THE 1931 FAIR TRADE LAW, AND ITS AMENDMENT IN 1933.

Matters rested on this basis in California until the passage of the 1931 Fair Trade Bill put the legal state of affairs into explicit form. Without doubt one strong reason for the passage of this Act was the doubt that had been raised with respect to the constitutionality of the 1909 Amendment to the Cartwright Act following the adverse decision by the United States Supreme Court in the Colorado case, Cline vs the French Dairy Company, May 31, 1927. The Colorado Anti-Trust Act provided that combinations otherwise unlawful shall be lawful if the purpose is to obtain reasonable profits on products not yielding reasonable profit. The United States Supreme Court held this invalid as a violation of the 14th Amendment to the United States Constitution by denying due process.(*)

Another leading factor in the situation was the fact that in 1931 the United States House of Representatives passed the Capper-Kelly resale price maintenance bill which then failed to reach a vote in the Senate. The California Fair Trade Law has often been called "The Junior Capper-Kelly Bill" because it was the intra-state expression of the same legislative procedure. Since the California statute and its 1933 Amendment have largely set the pattern for nine other states that have since passed similar laws and since there is a major movement at present to achieve the right of resale price maintenance piece-meal under State Law, it is clear that the California Law deserves careful examination. The 1931 Act and the 1935 Amendment read as follows:

"An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

The People of the State of California do enact as follows:

Section 1. No contract relating to the sale of resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law or the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discon-

(*) 274 U. S. 445

timing delivery of any such commodity.
(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.
(3) By any officer acting under the laws of any court.

Section 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 3. The following terms, as used in the act, are hereby defined as follows:
"Producer" means grower, baker, maker, manufacturer or publisher.
"Commodity" means any subject of commerce.

Section 4. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 5. This Act may be known and cited as the "Fair Trade Act."

Approved May 8, 1931
Effective August 14, 1931

AMENDMENT

An Act to add a new section to the "Fair Trade Act" to be numbered 1½, relating to unfair competition.

The People of the State of California do enact as follows:

Section 1. A new section is hereby added to the "Fair Trade Act" to be numbered 1½ and to read as follows:

Section 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of Section 1 of this Act, whether the person so advertising, offering for sale or selling, is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Approved May 8, 1933
Effective August 21, 1933

At this point no attempt will be made to discuss in detail the extent to which the 1931 law and the 1933 amendment were employed in the state. Likewise, no attempt will be made to discuss the more minute problems of interpretation arising under the law. Rather for introductory purposes, it will be adequate to examine the general nature of the law and the cases that have arisen under it and to review briefly its general application. In its 1933 form the law was a permissive statute allowing producers or owners of branded products to enter into contracts with resellers stipulating the prices at which the products are to be

resold. It is interesting to note that the law states "that the buyer will not resell such commodity except at the price stipulated by the vendor" because the majority of contracts that have been issued specify minimum resale prices, not fixed prices. It should be noted also that exceptions to contractual prices are made to allow (1) the closing out of an owner's stock for the purpose of discontinuing delivery of a commodity, (2) the sale of damaged or deteriorated goods below contract prices, (3) sale by an officer of a court of law. Very important is the fact that the law tolerates only vertical agreements; horizontal agreements are expressly prohibited. Finally, the application of the law is limited to trade-marked commodities "in fair and open competition with commodities in the same general class;" the presumption is that monopolistic products would be denied the privileges of the statute.(*)

In the period immediately following the passage of the 1931 Act, there were few additional attempts at resale price maintenance in the State.(**) Among the resistances to its use without doubt was the decline of sales in the early stages of the depression and the lack of organized pressure from the retail trades upon manufacturers. However, among the members of the trade it was felt that the prime reason for the absence of a serious, wide effort to operate under the Act was the tremendous difficulty of enforcing the law as a permissive, contractual arrangement. The law made available no means of dealing with price cutters who refused to sign contracts and who, normally, had little difficulty in obtaining supplies outside the state, if local sources were closed.

It was the 1935 Amendment which gave the law its vitality and provided the pattern for the other states in the country. The effect of this amendment is to make price control "run with the goods" for it makes violations of contractual prices actionable "at the suit of any person damaged thereby," even though the violator has entered into no agreement with the producer or owner. Since the law is worded "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract," the presumption is that the plaintiff must establish that the contractual prices have been called to the attention of the violator. Not only did this Amendment put vigor into the law, it by the same token provided the prime element for testing in the courts. To date there have been a number of superior court cases arising out of action taken under this amendment; one of these is now before the Supreme Court of the State and should be decided in February.

III. REVIEW OF CASES BROUGHT UNDER THE LAW

Up to November 1, 1935, the writer has information concerning

---

(*) The problem of the nature and meaning of fair and open competition in relation to its opposite "monopoly" is discussed below.

(**) For details see the discussion of the developments in the grocery and drug trades below.

thirty-one cases that had reached decision or were in the process of litigation; in addition, a considerable number have been settled out of Court. Complete information is not available at this point over all these cases. Insofar as results are known to the writer, they have been as follows: One denial of motion for restraing order, one denial of motion for preliminary injunction, eleven instances where preliminary injunctions were granted, four temporary restraining orders issued, five permanent injunctions granted (of these, three likewise involved the awarding of judgment of $100.00 each). In short, in the cases to November 1, 1935, there have been only two adverse decisions.

Lengthy written statements of opinion on the part of the judges are not available for the majority of cases. An examination of the small number of detailed opinions issued indicates the nature of judicial opinion.

MAX FACTOR & COMPANY vs CLARENCE G. KUNSMAN

The two adverse decisions to November 1, 1935 were handed down by Judge Emmet H. Wilson in the Superior Court of Los Angeles County. The first of these Max Factor & Company vs. Clarence G. Kunsman, (October 18, 1933) is now a test case before the Supreme Court of the State and should be decided by February 1936. Kunsman, operating a drug store in Los Angeles, had refused to sign the price maintenance contracts of the Max Factor Company and its distributor, Sales Builders, Inc. and sold the products of the plaintiffs below the prices stipulated in contracts signed by many of its dealers. The plaintiffs alleged that Kunsman's tactics were disrupting their system of contracts and causing other dealers to threaten the cancellation of their contracts. Hence, the plaintiffs, were applying for a temporary injunction to restrain the defendant from cutting prices. Judge Emmet H. Wilson, in denying the application, developed a line of reasoning which may be summarized as follows:(*) "The right of a manufacturer to determine the resale price of his product must be exercised if at all by contract. He cannot extend his control beyond his own sales, and he cannot impose conditions which will follow into the hands of persons with whom he has no contractual relation"(*)....."A covenant in relation to personal property binds only the one making it and his personal representatives, and does not run with the property like covenents relating to land." The it is stated that "one of the incidents of property is the right of alienation".....,(**) and that a statute may prohibit or seriously interfere with this right, or interfere with private business only under the police power. The argument is summarized as follows: "The sale by defendant of cosmetics, to which he has unencumbered title, at a price less than that determined upon by a contract between the plaintiffs and some other dealer, can be

---

(*) Opinion No. 363,006

(**) Judge Wilson cited at this point Dr. Miles Medical Company vs John D. Park & Sons, Garst vs Hall and Lyon Company, Bobbs-Merrill Company vs-Straus, Bauer vs O'Donnell.

no more detrimental to the public safety, morals, peace, health, or welfare than the sale of theatre tickets at a price greater than that charged by the theatre management, or than the issuance of trading stamps with sales of merchandise."

It necessarily follows that Section 17 of the Fair Trade Act is in violation of the Fifth and Fourteenth Amendments to the Constitution of California, in that it deprives persons of their property without due process of law and without compensation, it abridges the privileges and immunities of citizens, it deprives them of the full and free use of restraint upon the alienation of property and upon contracts, and it is an unlawful interference with private business. It is not a valid exercise of the police power and it is not for the protection of the peace, health, safety, morals, or welfare of the public."

PYROIL SALES COMPANY, INC. vs PHIL PEP BOYS, et al

The second adverse decision handed down by Judge Wilson was in the case of the Pyroil Sales Company, Inc. vs. The Pep Boys, Manny, Moe & Jack of California, July 10, 1936.

The facts of this case are identical with that above and need not be reviewed. The plaintiff asked that the defendant be enjoined from selling the product at prices less than those stipulated in contracts between the plaintiff and other dealers. The unique element in the case arose out of the fact that counsel for the plaintiff and amici curiae argued that the effect of the decision of the United States Supreme Court in March 1934 in the New York Milk Case, (Nebbia vs New York, 78 L. Ed. Ad. Cas. 563) is "Such that it is necessary now to determine the constitutional questions in favor of the validity of the statute." Judge Wilson held that the conclusion reached in the Max Factor case was correct, and that the New York Milk case was not pertinent to the question. Judge Wilson's reasoning with respect to the significance of the Nebbia case cannot be summarized more briefly than in his own words:

> "In the Nebbia case it was pointed out that legislation controlling the milk industry in the interest of public health was adopted as early as 1862; that many subsequent statutes had progressively placed the industry under a larger measure of control; that 'save the conduct of the railroads no business has been so thoroughly regimented and regulated by the State of New York as the milk industry;' that during 1932, due to the low price of milk, the families of dairy producers became so impoverished that it was necessary to give state aid similar to that given to the unemployed; that the production and distribution of milk was a paramount industry of the state, the dairy business yielding fully one half of the total income from all farm products, and affecting the health and prosperity of the people; that the prevalence of unfair trade practices had led to such a demoralization of prices as to impair the credit structure of the state, and that the milk industry was affected by factors of instability which called for special methods of control. Upon a report of a legislative committee setting forth these facts, a statute was passed creating the Milk Control Board with power to supervise and regulate the entire milk industry of the

state, to make an investigation as to what prices would protect the industry and by official order to fix the minimum and maximum wholesale and retail prices to be charged for milk. The Board was to continue until March 31, 1934, at which date it was to be deemed to be abolished.

"The dissimilarities between the instant case and the Nebbia case are at once obvious. In New York, a legally constituted Board, after investigation as to conditions, fixed the prices of one product only, while here there is no provision for investigation or determination by any board or commission as to what would be reasonable or fair price for any commodity, but the power is given to the producer or owner of every commodity bearing a trade-mark, brand or name to establish his own price, provided only that the article is in competition with other commodities. In New York the legislation was temporary, the Board having been abolished on March 31, 1933, by the statute which created it, while here the statute is general and without limitation as to time. The New York statute applied to only one industry which, for the reasons stated in the statute and in the opinion of the Supreme Court, was affected with a public interest while our statute is all-reaching and all-embracing, applicable to every commodity bearing the trade-mark, brand, or name of the producer, irrespective of public interest. In the instant case none of the economic conditions are shown to exist or to have existed which gave rise to the New York Milk legislation, such as the impoverishment of a large percentage of the inhabitants of the state, placing them upon state charity, the destruction of one of the chief industries, and the impairment of the credit and financial structure of the state. In New York the prices were established for a commodity produced, sold and consumed in the state, a commodity upon which both the prosperity and the health of the people rested, but by the statute here the manufacturer of any article may fix the price, no matter where it is produced, and regardless of the dependence thereon of the prosperity or the health of the people.

PRICE FIXING NOT NOW LESS RADICAL

"The effect of the Nebbia case upon price fixing legislation cannot be expanded into justification of any and all legislation either directly fixing prices or authorizing the same. Legislative price fixing is neither novel nor radical. The Supreme Court said no more in the Nebbia case than that when a product is affected with a public interest or clothed with a public use, the price of the product may be fixed by law, thus extending to the milk industry the same regulation that, in a long line of cases, beginning with Munn vs Illinois (1877), 94 U.S. 113, 24 L. Ed. 77, and continuing to date, had been imposed upon other businesses which, although not public utilities, were clothed with a public interest. Meantime the same court has held that the business of selling gasoline (Williams vs Standard Oil Company, (1929), 278. U.S. 235, 73 L. Ed. 287) and the business of manufacturing and selling ice (New York State Ice Company vs Liebmann (1932), 285 U.S. 262, 76 L. Ed. 747) were not affected or clothed with a public

interest to such an extent as to justify or to sustain legislative regulation of prices of gasoline or a requirement that an ice manufacturer procure a license."(*)

At the end of this opinion, Judge Wilson stated that "certain individual rights and personal liberties must be surrendered in order that civilization may progress. To this end restraints are imposed by law and sustained by the courts." Then he argued that "indiscriminate cutting of prices below cost is economically unsound and is demoralizing and ethically unjust to those who are maintaining good business standards." Next, he proceeded to draw an interesting simile between the maintenance of sanitation in matters of health and "sanitary economics," stating "the establishment and maintenance of sanitary economics as well as sanitation in matters of health, is within the power of the legislature." His basis for throwing out the present case in view of this opinion, was that in this case the prices were to be established not by the legislature but by private parties. Furthermore since the wording of the statute is "at a price less than stipulated in any contract," it would be possible for a single contract, even if made "with a small dealer in an obscure community" to establish the price for all dealers. In other words, Amendment 14 allows arbitrary price fixing outside legislative control.

WECO PRODUCTS CO. OF CALIFORNIA vs SUNSET CUT RATE DRUG CO.

The first, and to date, most significant favorable decision was that Judge T. I. Fitzpatrick of the Superior Court of San Francisco in the case of Weco Products Company of California vs Sunset Cut Rate Drug Company decided, January 2., 193[illegible].

The facts here are similar to the above. The Sunset Company had not signed a contract and had cut prices on Weco tooth brushes and dentrifices which it had obtained through indirect channels, unknown to the Weco Company. The plaintiff alledged not only that this action caused other dealers to cancel and violate contracts, but that it led the public to believe the products were not worth their nationally advertised prices, and that continuance would be "great and irreparable injury to the plaintiff."

Among the more important elements of the opinion of Judge Fitzpatrick in the granting the temporary injunction which was asked there should be noted the following:

The California Fair Trade Act merely spreads upon the statute books the common law doctrine previously enunciated in Crogan vs Chaffee and D. Ghiradelli vs Hunsicker. There is no problem of inter-state commerce involved. "The only ground, therefore, upon which the validity of the enactment here considered can be attacked is that its provisions constitute an interference with the due process clauses of the State and

---

(*) Opinion No. 372,896

Federal constitutions, and therefore an invalid attempt to exercise the so-called police power." That, it is pointed out that the purpose of Amendment 1½ is to protect the contracts authorized by the Act. Judge Fitzpatrick stated that he found "no recorded opinion of either the Supreme Court or District Court of Appeals" in the State of California which touched upon the precise question involved."

In addition to the factor of contract rights in relation to Amendment 1½ is the problem of the protection of the goodwill of a business. To quote at length:

"Quite apart from the effect of Section 1½ in protecting contract interests is its protection of the good will of a business, including the rights deriving from distinctive trademarks, brands and labels. Plaintiff's complaint reveals that the value of these identifying marks has been established by a course, over a period of years, of manufacturing articles of merit, selling them at reasonable prices, and extensively advertising them. The whole process is involved, and, as the complaint further alleges, the ability to offer the products to the public at the reasonable prices, nationally advertised, depends upon volume production and distribution. For a retailer, or anyone else, to destroy the benefits of this system of business by cheapening the product in the public mind - especially when this is done for the purpose of merchandising inferior products - seems inequitable as a matter of fact, and a statutory declaration having the effect of declaring it unfair competition is within the province of the State Legislature.

"The Legislature of this State did not pioneer in the discussed enactment. In Ingersoll & Bro. vs Hahne & Co., supra, the Chancery Court in the State of New Jersey was called upon to determine the validity of an almost identical statute, being Chapter 107 of the New Jersey Laws of 1916, and reading as follows:

'It shall be unlawful for any merchant, firm or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in case where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business.'

"The New Jersey court, in the two decisions bearing the above name, was considering a cause of action almost exactly like that stated in the second count of plaintiff's complaint herein. Defendant Hahne & Co. was advertising, selling, and offering for sale Ingersoll watches at $1.00, although the manufacturer had complied with the New Jersey Statute by carrying upon its goods notices calling attention to the $1.55 retail price and advising,

in some detail, that selling watches for less was an unlicensed use of the name, trademark, guaranty, good will, and selling helps of the manufacturer.

"The complainant sought a preliminary injunction, and, in 88 N. J. Eq. 223, the bill in equity was held to state a cause of relief, the court saying at page 229:

'It is the legislative function to establish public policy, and the public policy of this state has been, I think, with respect to the matter in question, settled by the statute hereinbefore referred to. I do not find that statute repugnant to the constitution either of the United States or of this State. There was no obligation upon Hahne & Company to purchase the watches in question, nor was there any obligation upon the complainant to manufacture and sell them. If Hahne & Company chose to purchase the watches in question with the notice attached, of which I must presume it had notice at the time of purchase, there is no injury done the done the defendant by compelling it to observe the provisions of the notice. As Mr. Justice Holmes said in the Dr. Miles Company case: 'I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear.'

"An exercise for more ground to the case at bar could hardly be made. Defendants in the instant case are alleged to have had notice of the contracts, to know that plaintiff's rights were being invaded by their actions, and that plaintiff chose not to sell its goods to retailers except those who would contract to maintain its reasonable prices and thus protect its good will. In the decision, in the same case, now appearing in 89 N.J. Eq. 562, the New Jersey court supported issuance of an injunction, after hearing on the merits. Its decisions cover, by citation and sound reasoning, the questions at issue in the instant case. The court comments at page 330 as follows:

'The proofs before me demonstrate that if defendant and others are permitted to pursue their practice of price-cutting the business of complainant will be ruined and thereby the volume of interstate trade be reduced, or a method of distribution will have to be adopted which will greatly increase the price to the consumer, which will necessarily result in reducing the volume of interstate traffic; that in either event competition will be effectively reduced. And to what useful purpose? So that retailers may make use of the trade name and good-will established after extensive advertising, to the extent that the public have associated with the article a standard of value, to fool the public into a belief that because a standard priced article can be sold at a cut price all other goods sold are similarly low priced - in other words, to defraud the public.'"

Turning to Federal law, Judge Fitzpatrick states that in the Dr. Miles Medical Co. vs John D. Park case, it was the absence of statute that was determinative; and that the language of the opinion "most

strongly implies a different decision if the wrongs complained of were the subject of statutory prohibition." Similarly in the case of Bobbs Merrill vs Straus "the Court rested its decision solely upon the grounds that the copyright statutes did not provide for such a right and that the question was solely one of statutory interpretation."

Finally, there are a number of Federal decisions "Upholding the right of parties to a contract to be free from third party interference." The following cases are listed as particularly comparable to case at bar:

"Angle vs Chicago & St. Paul Ry. Co., 151 U. S. 1, 38 L. Ed. 55 (1894); Nashville C. & St. L. Ry. Co. vs McConnell et al.,, 82 Fed. 65 (1897); Tubular Rivet & Stud Co. vs Exeter Boot and Shoe Co., 159 Fed. 824 (1908); Dr. Miles Medical Co. vs Goldthwaite, 155 Fed. 794 (1904); Dr. Miles Medical Co. vs Jaynes Drug Co., 149 Fed. 838 (1906)."

On the basis of his review of State and Federal law, Judge Fitzpatrick then concludes:

> "Careful search among the reported decisions of the appellate courts of this and other states, and of the federal courts, reveals no decision declaring a statute of the type here involved to be violative of due process or any other constitutional provision, nor to be an unjustified exercise of the so-called state police power."

The legal review culminates in the following economic and social thesis:

> "This court can and does take judicial notice of the fact that the price-cutting of the type complained of in plaintiff's complaint not only undermines lawful rights and interest of the plaintiff, but jeopardizes the very economic existence of hundreds of independent retail dealers seeking their livelihood within the territorial jurisdiction of this court. In these days of economic adjustment and progress, it is particularly important that the courts do not fail to regard the salutary principle of constitutional law that the legislative body is presumed to be guided by proper considerations of public policy and that the will of the people as expressed through their duly elected representatives shall not be interfered with unless it very clearly appears that there has been a capricious or arbitrary abuse or legislative power.
>
> "As was said by Mr. Justice Holmes in his prophetic dissent in Dr. Miles Medical Co. vs John D. Park & Sons Co., supra:
>
> "There is no statute covering the case; there is no body of precedent that, by inductable logic, requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground

upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that, It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles' medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant assuming that the public will not be allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

GENERAL CIGAR CO., INC. vs THE DRUG MARKET

The second favorable decision to be examined in some detail is that of the General Cigar Co. Inc. vs The Drug Market (September 18, 1934) in the Superior Court of Los Angeles County, Judge Isaac Pacht presiding. The plaintiff, it was held, was entitled to a permanent injuction.

The opinion of Judge Pacht has three prime aspects: a reliance upon (1) the New Jersey case of Ingersoll vs Hahne & Company(*) (2) the Supreme Court decision in the New York Milk (Nebbia case,(**) and (3) an economic argument which aims to demonstrate that the general welfare is sufficiently involved to justify action under the police power.

(*) cf Judge Fitzpatrick above

(**) cf Judge Wilson in the Pyroil case

It is unnecessary to review Judge Pacht's use of the New Jersey case as nothing new is added. However, his judgment with respect to the Nebbia case is exceedingly interesting by way of contrast with that of Judge Wilson. For the "due process" argument Judge Pacht finds "complete answer in the language of Justice Roberts in the Nebbia case," as follows:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operations of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities co. vs. United States. 193 U.S. 197,337,338, 48 L. Ed 679, 700, 701, 24 S. Ct. 436. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competion by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. (Italics are Judge Pacht's).
>
> "The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an adequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately

to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to any one liberty to conduct his business in such a fashion as to inflict injury upon the public at large, or upon any substantial group of the people." (Italics are Judge Pacht's).

And again at p. 571:

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the State's resources may be justified. And statutes prescribing the terms upon which those conducting certain business may contract, or imposing terms if they do enter into agreements, are within the state's competency."

Finally, there is the economic theory which Judge Pacht employs to support his belief that the general welfare is sufficiently involved to justify recourse to the use of public power. To quote:

"The California Fair Trade Act was enacted in response to a growing and preponderating sentiment against business practices which have had a catastrophic effect upon large numbers of small and independent retailers. It is in evidence before me, and no doubt brought to the attention of the legislature, that the underselling of branded and trade-marked articles has resulted in the bankruptcy of hundreds of small independent dealers, leaving in its wake unemployment and economic distress.

"Justice Holmes in Dr. Miles Medical Co. vs John D. Park, 220 U.S. 373 (55 L. Ed. 502) denounced price-cutting as the practice of knaves who resort to it, not for the purpose of benefitting the consumer (as claimed) but for their own selfish and ulterior purposes. The problem has engaged the attention of economists, trade associations, Chambers of Commerce, jurists, state legislatures and the United States Congress. (See "An Ideal Charter for Trade Associations" - an address delivered by Feiker before American Trade Association Executives; "Freedom of Contract" by Farnsworth L. Jenkins, Vol. 22 No. 6 Cal. Law Review (September 1934); Predatory Price Cutting as Unfair

Trade. 27 Harvard Law Review, 139 Fisher Flouring Mills vs. Swanson, 137 Pac. (Washington)144; and the very lucid and interesting observations of Gilber H. Montague in "Business Competition and the Law"). The pernicious and destructive effects of price-cutting are well set out in a very comprehensive comment on "Retail Trade Regulations and Their Constitutionality" 22 Cal. Law Review, P. 85 where the following pertinent observations are made:

"The part which retailing as the agency of distribution has played in causing this economic emergency, and the part that it must play in bringing about a more balanced economic system is closely interwoven with the factors of production, labor and capital. These, unhampered by any "paternalistic" control, have together spun themselves into an economic whirlpool - a circle which any one factor alone was afraid to try to break, and which was drawing all of the, prices, wages, and profits, ever lower to the vortex of economic chaos. The problem is not a simple one and the complicated operation of the factors involved is not completely understood. But this we have seen: unbridled competition among producers and distributors leads to price-cutting; the larger distributor, in order to retain his profit shifts the loss of the price-cutting upon his employees, or if they be farmers, bear it theselves. The theory that production will automatically limit itself when the entrepreneur cannot make a reasonable profit has failed as an effective safety brake, for a glutted labor market permitted the cost of production to be pressed down to unbelievable levels with the loss taken from the wages which should have gone to labor. But as the farmers and the laborers constitute the major portion of the consuming public, buying power decreased as their return was diminished, and the competitive race among distributors became still keener, forcing prices, and, in their wake, wages, still lower. It is this vortex that has had to be broken."

It may be of interest before leaving this case to note that Judge Pacht has a broad, elastic, conception of the police power. He holds that the limited conception of police power as applying only to matters of public health morals or peace was definitely held erroneous long before the so-called New Deal" legislation came before the Courts for interpretation. He quotes Justice Lennon in Miller vs. Board of Public Works. as follows:

"In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exer-

cise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations' to 'promote the economic welfare, public convenience and general prosperity of the community.' (Chicago B & O RR co. vs. Illinois, supra.)

"Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of extension to meet existing conditions of modern life and thereby keep pace with the social, economic, moral and intellectual evolution of the human race. In brief 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.' (Streich vs. Board of Education supra), and that power 'may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderent opinion to be greatly and immediately necessary to the public welfare.'(Nobel State Bank vs. Haskell 219 U. S. 104, Ann. Cas. 1912A, 487, 32 LRA (NS) 1062 L. Ed. 112, 31 Sup Ct. Rep. 186, see also Rose's U. S. Notes)".

Again at page 484 he says:

"In short, the police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public. That is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because: 'What was a reasonable exercise of this power, in the days of our fathers may today seem so utterly unreasonable as to make it difficult for us to comprehend the existence of condtions that would justify same; what [illegible] would by our fathers have been rejected as unthinkable is today accepted as a most proper and reasonable exercise thereof.' (Streich vs. Board of Education. 34 S.D. 169, Ann. Cas. 1917 A, 760, LRA, 1915 A, 682, 147 N.W. 779)."

EMERSON vs WEINSTEIN

The last case to be examined is that of Emerson vs. Weinstein in which a stipulation was entered on September 23, 1935. Judge I.L. Harris* threw little new judicial light upon the problem in his

(*) No. 25589

opinion. He merely stated that in his view the constitutionality of the original enactment in 1931 might be sustained by the reasoning in the cases prior to this time in California. Likewise, he felt that no monopoly question was present in the case; hence, there was no basis for action on this score. There was left only the question of the absence of contract for in the earlier cases the defendants had been bound by contracts. However, Judge Harris argued that the Amendment of 1933 may be sustained "upon the principle that the passage of such an act would render great aid in the enforcement of the original act, if indeed it were not absolutely necessary to its enforcement. Acts of the sort contained in the said amendment are justified upon the principle that they exclude the opportunity for evasion which otherwise might be successfully practiced."

However, in the last three paragraphs of his opinion Judge Harris indulged in a bit of judicial legerdemain which will not assist in clarifying rights under the 1933 amendment when he stated:

> "The provision in a contract that a vendee will not sell for for less than the stipulated price, does not follow the article into the hands of a subsequent vendee, and he cannot be prevented, at the suit of the manufacturer from selling at less than the stipulated price, although he knew that the manufacturer sells only subject to such stipulation.
>
> Garst vs Hall 55 LRA. page 631; 179 Mass. 589
>
> This case is mentioned in the opinion of Judge Angellotti in the Ghiradelli case, and I am mentioning this case not because I believe that it in any way interferes with the conclusion that I have come to, but merely for the purpose of preserving the citation; as I believe the amendment of 1933, namely, Section 1½, mentioned above, imposes an obligation on the vendee not to sell under a price fixing contract made between the manufacturers and his vendees.
>
> I can, however, conceive the possibility of a case where the manufacturer or the original vendor might be stopped from seeking injunctive relief against a vendee who merely had notice of the contract. But, be that as it may, no such case is made out before me; and furthermore, I believe that under the amendment of 1933, namely, Section one and a half, if it should develop that the manufacturer were estopped, nevertheless some vendee of his might pursue the remedy provided for under Section one and a half. It will be recalled that said Section one and a half, namely, the amendment of 1933, gives a right of action to any person aggrieved, which in my opinion would include not only the manufacturer, but the vendees to whom he sold, subject to the contract."

One cannot but wonder as to the sort of case that Judge Harris had in mind in which "the manufacturer or iriginal vendor might be estopped from seeking injunctive relief against a vendee who merely had notice of contract;" especially since no such case had been made out in the present instance.

So much for a review of the opinion of Judges in leading cases. It is useless for purposes of this paper to attempt to predict, or to speculate too largely about the outcome of the test case before the Supreme Court of the State. The members of the trade who are partisans of amendment one and a half are highly optimistic and predict that the fact that the overwhelming majority of Superior Court cases have been favorable is a definite indication of the attitude of the Justices of the Supreme Court. The opponents hold that Section one and a half is an unconstitutional delegation of legislative power as well as an infringement upon due process of the law. A few short weeks will resolve the issue as far as the highest court of California is concerned.*

(*) It may not be too much of a digression to note that rights similar to Section 1½ obtain in British Law only in the sale of patented goods. In Great Britain in the sale of patented articles the owners may control resale prices when the purchasers and sub-purchasers have knowledge of prices and terms even though there is not a specific direct contractual relationship. The customary procedure is to attach the prices for resale and conditions of the limited license agreement to the commodity or upon its container. The British courts and legislature have not, to date, been willing to extend these rights to non-patented goods. On the other hand, British law provides a much broader general basis for price maintenance activities because combination among members of the trade and secondary boycotts to enforce contractual prices and terms are lawful. Grether. E.T. op.cit. Section 1.

CHAPTER II. THE PROHIBITION OF DISCRIMINATION IN PRICING

I. THE ACT OF 1913

On August 10, 1913 there began a sequence of legislation which culminated finally in 1935 in the formidable Unfair Practices Act. The 1913 Statute (*) was entitled "An Act Relating to unfair competition and discrimination" and its prime provision was "It shall be unlawful for any person, firm, or corporation, doing business in the State of California and engaged in the production, manufacture, distribution or sale of any commodity or product of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which, in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities, or cites or portion thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city ..... than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity".** It was added that motion pictures delivered under a lease were not deemed commodities under the Act.

It should be noticed that the date of this Statute, 1913, is prior to the period when chain stores became an important, large scale competitive factor in the distribution of goods at retail. Very likely the Statute had its chief significance in the public utility field.

The Anti-Discrimination Act of 1931.

In 1931, the 1913 public utility Statute was resurrected and amended, now, however, directed primarily at chain store systems. This amended Act became known as the Anti-Discrimination Act. The nature of the amendments will not be reviewed here because they reappeared, with significant modifications in the 1935 Unfair Practices Act.

II. THE 1933 BELOW COST ACT

In 1933, Assembly Bill 770 passed the legislature amending the 1913 Act as follows:

> Section 1a. Every person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state, who shall sell any article or product at less than the cost thereof to such vendor,

---

(*) Act 8781, Ch. 276

(**) Italics are the writer's.

or give away any article or product, for the purpose of injuring competitors and destroying competition, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500), or by imprisonment not exceeding six months, or by both said fine and imprisonment. The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all necessary overhead expenses of the producer; and as applied to distribution "cost" shall mean the cost of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The provisions of this section shall not apply to sales made:

(1) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, that is, as in the case of the sale of seasonal goods, or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation;

(2) When the goods are damaged or deteriorated in quality and notice is given to the public thereof;

(3) By any officer acting under the orders of any court.

III. THE UNFAIR PRACTICES ACT OF 1935.

The Anti-Discrimination line of legislation which had begun in 1913, which was modified in 1931, and amplified to include a prohibition of sales below cost "for the purpose of injuring competitors and destroying competition" reached its climax in the Unfair Practices Act of 1935, which brought all of these fragments together and added additional segments. Because of its importance the Act is reproduced here in its entirety.

CALIFORNIA UNFAIR PRACTICE ACT

An act to amend an act entitled "An Act relating to unfair competition and discrimination, making certain unfair and discriminatory practices unlawful, defining the duties of the Attorney General in regard thereto, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this act a misdemeanor and proving penalities," approved June 10, 1913, relating to unfair discriminations, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

Section 1. The act cited in the title hereof is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm, or corporation, doing business in the State of California and engaged in the production, manufacture, distribution or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations, in such sections, communities, cities, or portions thereof in this State, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this act. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

Section 2. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person, as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firms or corporation for whom or which he acts.

Section 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give, or advertise the intent to give vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

4 The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses

of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

Section 4. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

Section 5. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against a member has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

Section 6. The provisions of sections 3, 4 and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any courts;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor within the meaning of this act.

Section 7. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in Section 11 of this act.

Section 8. Upon the third violation of any of the provisions of sections 1 and 7, inclusive, of this act by any corporation, it shall be the duty of the Attorney General to institute proper suits for quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter, rights, franchises or privileges and powers exercised by such corporation, and to permanently enjoin it from transacting business in this State. If in such action the court shall find that such corporation is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this act, it must enjoin said corporation from doing business in this State permanently or for such time as the court shall order, or must annul the charter, or revoke the franchise of such corporation.

Section 9. Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of sections 1 to 7, inclusive, of this act is declared to be an illegal contract and no recovery thereon shall be had.

Section 10. Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 1 to 7, inclusive, of this act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be

alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Any defendant in an action brought under the provisions of this section may be required to testify under the provisions of sections 2021, 2031 and 2055 of the Code of Civil Procedure of this State, in addition the books and records of any such defendant may be brought into court and introduced, by reference, into evidence; provided, however, that no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of sections 1 to 7, inclusive, and 11 of this act.

Section 11. Any person, firm, or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of sections 1 to 7, inclusive, of this act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

Section 12. If any section, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act. The Legislature hereby declares that it would have passed this act, and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative and in addition to the remedies prescribed to the Public Utilities Act for discriminations by public utilities. If any conflict shall arise between this act and the Public Utilities Act, the latter shall prevail.

Section 13. The Legislature declares that the purpose of this act is to safeguard the public against the creation of perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This Act shall be literally construed that its beneficial purposes may be subserved.

Section 14. This act shall be known and designated as the "Unfair Practices Act."

Section 15. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 1 of Article IV of the Constitution, and shall therefore go into immediate effect. The facts constituting the necessity are as follows:

The sale at less than cost of goods obtained at forced, bankrupted, close out, and other sales outside of the ordinary channels of trade is destroying healthy competition and thereby forestalling recovery. If such practices are not immediately stopped many more businesses will be forced into bankruptcy, thus increasing the prevailing condition of depression. In order to prevent such occurrences it is necessary that this act go into effect immediately.

Approved July 15, 1935.

Chapter 477 Laws of 1935
Assembly Bill 1870

The various attempts to operate under the 1935 Act and the extent to which the earlier Acts were employed will be discussed in connection with the review of conditions in the grocery and drug trades below. At this point it need merely be noted: (1) that the 1913 anti-discrimination act had no general significance to the wholesale and retail trades, its prime importance being as the progenitor of the present law; (2) that the 1931 anti-discrimination act had some slight application against chain stores, probably was even more effective as a potential threat; and (3) that the 1935 sales below cost act likewise was used only to a slight extent, partly because of the presence of the NRA codes. All of these points will be illustrated by specific examples in later sections. In this section the intent is merely to interpret the law and to present the more important problems that its application raises.

Section I of the Act merely reproduces the former Anti-Discrimination Act of 1913 and 1931. Section III and IV, the Below Cost provisions, are the core of the Act and the most significant portions of it in relation to the problem of this Study. It is stated that it shall be "unlawful .... to sell, offer for sale, or advertise any article or product, or service or output of a service trade at less than cost thereof to the vendor" or to "give, offer to give, or advertise the intent to give away" the above classes of products "for the purpose of injuring competitors and destroying competition." Cost is defined as invoice or replacement cost, whichever is lower, of the product, plus the cost of doing business. The cost of doing business is defined as "all costs of doing business incurred in the conduct of such business" and (as if not satisfied with this general statement) a considerable number of items of expense are enumerated which must be included. This enumeration comprises such minutiae as "all types of licenses", and "credit losses" but does not include interest on fixed investment, except insofar as it might appear under "interest on borrowed capital", It is difficult to understand the

governing principle which would exclude interest on the owner's investment, yet specifically includes salaries of executives and officers. Invoice cost as the base upon which "cost of doing business" is added must be that invoice cost in the ordinary channels of trade, not the purchase price at forced or bankrupt sales, except insofar as the merchandise is segregated and so designated. Finally, and exceedingly important, is the provision in Section V that the established cost survey of a trade or industry in a locality "shall be deemed competent evidence to be used in proving the costs" in any given instance. In accordance with the intent of this provision there was a great deal of discussion among various trades and there were some attempts to make cost surveys. These cost provisions of the Act suggest the following serious difficulties of interpretation that must eventually be clarified:

1. What does constitute the cost of doing business mandatory in the Act? The general wording suggests all costs, the specific enumeration omits "interest on fixed investment and numerous small operating expenses."

2. Since the enumeration of items is essentially that of the Census of American Business, was it intended that these costs would be employed?

3. How would the costs be computed with respect to individual items? If the average expense figure must be applied to all items, then clearly a serious error is made for in an assembly of merchandise the various particular costs may be far above or below the average figure. Worse still, any attempt to compute particular costs inevitably involves a large element of arbitrary allocation which would provide the basis for wide differences between firms even under similar conditions. Yet this cost problem is simple compared with the problem of adjustment between firms where one is a specialist in an item or line, and the other uses it merely as a supplementary item or line. It seems that this problem is so treacherous and difficult that it is not subject to solution except on the basis of arbitrary procedure. This statement immediately suggests the dilemma of the cost provision, viz., arbitrary procedure might very well be declared contrary to the intent of the Act whereas a forthright attempt at compliance leads into hopeless confusion or into dis-economy from the standpoint of cost accounting and operating efficiency. It appears that this paradox has forced itself upon the leaders of the trades. Apparently, the trades that wish to employ the Act have in mind an arbitrary cost figure of a stop loss variety. It is possible that this attitude is tempered partly by the fear of the consequences that might arise from an unduly rapid increase in price level. More likely, this attitude of mind is derived from a knowledge of the difficulties outlined above and is the heritage of the stop loss provisions of the retail code. This interpretation seems especially valid because in the two trades discussed in this study, to date, the code loss limitation provisions have been employed. Yet, when the trades proceed on this basis it would appear difficult to justify the procedure before the courts in view of the wording of the Act. It appears that the solution of the matter might arise only out of a court interpretation that sales below invoice, or below invoice cost, plus an

accepted minimum stop loss margin, might be acceptable as evidence of "purpose of injuring competitors and destroying competition" (Section 5). It appears that this solution might be forced by another stipulation in the act: viz., "that the provisions of Sections 3, 4 and 5 shall not apply .... in an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service .... in the same locality or trade area." The "legal prices" which might, therefore, establish the floor to the market might very well be the costs of a non-service low cost establishment which has added the given item as a side line and which might justifiably claim that less than the average mark-up should be applied to the item. Whatever be the ultimate outcome, two things are clear; (1) there will inevitably be much experimental jockeying in the trades and in the courts before a conclusion will be reached, (2) it would require extraordinary temerity in the ordinary retail trades to attempt to enforce a mark-up equal to any average cost of doing business figure which might be derived from a cost survey. A large enough number of cases are now before the lower courts in California to produce significant interpretations in the near future. The phrases "with the intent to destroy competition" (Section 1) "for the purpose of injuring competitors and destroying competition" (Section 3), "to the injury of a competitor ...." and "tends to destroy competition" (Section 7) will remain as terminological barriers to large scale activity under the Act unless the courts eventually work out a standardized formula of some sort which is acceptable as evidence of the intent or motive. However, enforcement is made easier in two significant respects in the 1935 Act for (1) the burden of proof is laid upon the defendant, (2) trade associations are specifically empowered to maintain an action to enjoin a continuance of any act or acts in violation. (Sections 10 and 11). The consequence of the latter provision has been a major attempt to organize California trades to operate under the Act. The old code organizations have provided the pattern and the opportunities for trade associations executives provide the stimulus for a large scale endeavor. If the amount of discussion and the number of attempts already under way are any criterion it seems safe to predict a large development in case a relatively routinized legal procedure eventually develops. Another aspect of the Act may become exceedingly significant. It will be noticed that under Section 8 it is the duty of the Attorney General to institute suits for forfeiture of charter, rights, francises and privileges and powers upon a third violation of any of the provisions of the Sections of the Act; further, that if the court finds that the defendant is guilty "it must enjoin said corporation from doing business in this State permanently or for such time as the court shall order, or must annul the charter or revoke the franchise of such corporation." This stipulation is an extraordinarily weighty, potential threat against violators, particularly chain stores that might easily accumulate three or more violations among their units. It would be an interesting spectacle, to say the least, to see a large corporation before the court under this provision. The Act concludes with the statement that it is an emergency measure because "the sale at less than cost of goods .... is destroying healthy competition and thereby forestalling recovery,"

That is, this particular piece of legislation as was true of the NRA codes and of the court cases reviewed above, claims the support of an economic thesis. Therefore, it does not seem unreasonable to suggest that the merits of the Act be weighed not only in terms of legal precedent but in the light of economic criteria.

IV. THE POLITICAL FORCES BEHIND THE LEGISLATIVE PRICE STABILIZATION DEVICES

The influential political forces behind the legislative devices outlined in the preceding sections have been the various retail associations of the state of California. Within the state there are some of the most cohesive and powerful retail organizations in the country headed by aggressive, able officers, particularly executive secretaries. The smaller independent merchants have developed a class consciousness out of which has arisen effective, direct political action. This attitude of mind shows itself in other directions as in the large, long established, powerful cooperative buying and merchandising groups. In San Francisco, for instance, there are two voluntary merchandising groups in the grocery trade that date back to the first decade of the century. It has been interesting to note that after each legislative triumph the officers of various retail associations have taken individual credit for the enactment. However, the center of the battle and the stress varied between lines. The Fair Trade Act was nurtured in the Southern and Northern California Retail Druggists Associations (particularly in the office of the Southern Association) and the center of interest and of the legislative battle was in these two groups. This state of affairs is as one should expect, for the retail druggists have more to gain from resale price maintenance legislation than the majority of retail trades. In this instance, some of the chains were also partisans of the legislation, apparently because newer cut-rate types were removing much of the chain's former advantage gained by price cutting tactics. In the other aspects of the legislation the large scale retailers, on the whole, were in opposition, actively or passively. The center of the endeavour in this instance appears to have been in the grocery business, with the close cooperation of other retail groups.

One can only partially explain legislation in terms of the pressures exerted by the partisan groups; of co-significance is the passivity or absence of other groups. Among these non-resistant factors there should be noted:

1. The state of economic depression throughout all these years which, without doubt, not only tended to increase the vigor of demands but to beat down opposition from those who either had nothing better to offer or had their own demands to make. It is exceedingly important that this legislation in its present form is a by-product of depression; what prosperity will do to it, may soon be known.

2. The agricultural bloc of the State, the vote of which is essential to the passage of legislation, is highly susceptible to the influence of small dealers. It was voting control schemes for agriculture, and had largely accepted the proposition that price cutting in retail markets reacts unfavorably upon primary producers.

3. The periods of legislative assembly, especially in 1935, were crowded with so many major economic and social proposals that many did not receive large public attention. This was particularly true of the Unfair Practices Act. However, it seems clear from the review of the growth by accretion from 1913 to 1931, 1933 and 1935, and the nature of the forces that were operating that it would have been passed as an emergency measure in any event. Particularly indicative was the chain store tax passed by the 1935 legislature which was pushed by the same retail interests without, of course, the assistance of the chains and which did achieve large publicity.

CHAPTER III

DEVELOPMENTS IN THE GROCERY TRADE

I The Official Attitude.

Officially, the retail grocers were active sponsors of the California Fair Trade law. At the annual conventions of the state association, in meetings of local associations, in the speeches of secretaries, in the official publications, there are numerous references to the Fair Trade law; the California Retail Grocers and Merchants Association took particular pride in listing the 1931 Fair Trade Act and the 1933 Amendment among its legislative achievements. Yet the Fair Trade law has been employed to an almost negligible extent in this trade, whereas the Unfair Practices Act has aroused a major movement.

Four Price Maintenance Procedures

There have been four general price maintenance procedures in recent years under California state law on the part of grocery manufacturers.

1. The suggesting of prices with no particular attempt at enforcement, except perhaps an occasional effort to deal with an especially bad situation by education and persuasion or by threat of refusal-to-sell.

2. The formal establishment of "stop prices" which are publicised as the official minimum prices on the products listed but without any attempt to issue contracts under the Fair Trade law.

3. Operation under the California Fair Trade Act by the issuance of contracts to the trade.

4. Procedure under the prohibition of sales below cost in the Unfair Practices Act of 1935 and its 1933 predecessor.

The first procedure which involves merely the recommendation of prices with usually very little effort at policing has been of little practical consequence except insofar as it tends to give retailers a general guide in pricing. In the summer of 1934, one hundred retail grocers were interviewed in the San Francisco Bay region with respect to various aspects of price maintenance. The grocers were unanimous in their opinions that only a small proportion of suppliers suggested resale prices to them. They were equally of the opinion that attempts at the enforcement of recommended prices were almost entirely absent. The interviewer made note of any firms the dealers were able to mention as suggesting resale prices. This list included fifty firms. Only one firm was mentioned by as many as fifteen dealers. A survey of manufacturers and wholesale distributors in the San Francisco Bay area in the fall of 1934, showed the same results. Forty six of the one hundred ninety firms interviewed were suppliers in the food field; of the forty-six, twenty-nine stated that they made no pretense of suggesting resale prices; of the seventeen who made suggestions only five were making any attempt to control resale prices and none of these were

employing Fair Trade Contracts. During January and July, 1935, thirty-nine manufacturers and distributors of foods were interviewed in Los Angeles. However, in this case, some of the firms were selected because of their known experience with price maintenance. Of the thirty-nine, 22 stated that they suggested prices to dealers and eight were making an attempt at enforcement.

The establishing of minimum resale prices of a formal sort (called "stop prices" by the trade) has been pushed by the officers of the State Association; but has not become of great consequence. Such stop price procedure might take place under the California Fair Trade law through the issuance of contracts; actually, one must comb the trade very closely to find any evidence at all of such usage. It became the custom of the California Retail Grocers' Advocate to publish a list of the brands maintaining a stop price. Eventually, two lists were published, one, of brands maintaining a stop price without the use of contracts, the other of firms issuing contracts. On August 12, 1932, the non-contract list contained 38 items (including different sizes) and fourteen firms. By September 15, 1933 this list had expanded to 120 items and 42 firms. Gradually, however, this listing decreased in numbers until in 1935 it has largely given way to a list of minimum prices suggested under the Unfair Practices Act. On April 20, 1934, the contract list contained 29 items and six firms. However, only one of these firms, a coffee roaster, was a grocery manufacturer, the others were wine and liquor firms. Throughout the 1934 period of listing, only three regular grocery items appeared; viz., two coffees and a nut margarine. In other words, Fair Trade contracts, to date have had significance to the grocery trade in California, only in a few instances, and primarily in lines falling outside the field of groceries. (*)

II The experience with and attitude toward contractual and non-contractual price maintenance.

Before discussing developments under the Unfair Practices Act it is important to examine in detail the experience of retailers and manufacturers and distributors with the small amount of formal resale price maintenance.

A. Retail Experience and Attitudes.

The general run of grocery retailers have not had sufficient experience with serious price maintenance schemes to make possible any significant generalization. However, two conclusions may be derived from this lack of experience: (1) the majority of retail grocers in the summer of 1934 were unaware of the existance of the California Fair Trade Law. To be exact, 57 of the 100 retail grocers interviewed

---

(*) Since this review is limited to the grocery and drug fields, these other attempts will not be discussed. It may merely be noted (1) that there is much price maintenance in the wine and liquor business, and (2) that a serious effort at control in the beer business collapsed and had not been revived by November 1, 1935, although there were rumors that a new endeavor was planned.

in the San Francisco Bay region were completely uninformed concerning the law. This was an interesting contrast to the drug field where all dealers were thoroughly informed concerning the law. (2) The majority of retail grocers had made no effort to further resale price maintenance. 89% of those interviewed stated that they had given no support at all to the movement, either by donations to the legislative fund or by participating with the retail associations. Only 21% gave any evidence of offering to cooperate with manufacturers who attempted to control resale prices, through featuring or pushing their products. However, as a matter of business principle, the great majority were definitely in favor of resale price maintenance, (91% so expressed themselves). The majority opinion was that such a program would be excellent but that it was impossible of achievement in this field. It should be noted that the above conclusions are derived from interviews from a non-selective list of dealers; a selected list of active members of one of the grocers' associations would, without doubt, show a different, but less representative result.

The larger chains and the smaller ones that feature cut prices expressed themselves as definitely in opposition to price maintenance. The voluntary chains were in favor of price maintenance. Two Southern California chains mentioned the quick action taken by a cereal manufacturer when they inadvertently cut the price of its products. One of these chains stated that they had immediately received two telegrams and four letters from this firm "asking them just what the idea was" and that they "expected the President to drop in by the next train". This firm has the policy of compliance but stated that if they chose they could do as they pleased and no individual manufacturer would be able to cut them off effectively.

B. Experience and Attitudes of Manufacturers and Distributors.

The experience and attitudes of the suppliers of retailers may be indicated in two ways (1) by general summaries of interviews (2) by an examination of the experience of certain concerns selected because of experience with price maintenance. Of the forty-six food suppliers interviewed in the San Francisco Bay area in the fall of 1934, twenty-four expressed themselves in favor of price maintenance. Five were definitely in opposition and seventeen were apathetic, having no opinion on the matter. Only sixteen stated that they had ever given any support to price maintenance. Seventeen stated that they felt that they were injured by price cutting in the retail trades; the balance thought it was immaterial to their interests. Of the five firms that had made some serious effort to maintain resale prices, two felt that it was possible to maintain prices effectively in the grocery field, three stated that they had concluded that it was impossible. Three of the five stated that retailers showed appreciation of their efforts and that they had benefited from the goodwill created.

In the Los Angeles interviews in January and July of 1935, twenty-one of the thirty-nine firms interviewed expressed themselves in favor of price maintenance, twelve in opposition and six had no opinion. Only nine had taken any action in support of price control. Ten firms stated that price cutting in the retail trades injured them, two felt they were benefited, and the balance stated it was immaterial. One

firm in the group was employing Fair Trade contracts; another had done so but had dropped the practice. Of the nine firms that had attempted to control resale prices, six felt such a scheme to be enforceable; three that it was very difficult to enforce, if not impossible. Eight of the nine agreed that effective enforcement would require broad cooperation among the members of the trade. Seven of the firms stated that retailers showed sufficient appreciation of their efforts to allow them to receive some benefit from their attempt at price control; two stated just the reverse.

Much more significant than a general tabulation is the experience and attitudes of a number of firms that are important, often dominant trade factors. (*)

C. Experience and Attitudes of Selected Firms.

1. A coffee roaster:

The coffee business was one of the few in which a number of manufacturers attempted to set up stop prices. This particular firm began to operate in this way early in 1932 but dropped its efforts when the NRA code became effective because it felt that the code 6% mark-up accomplished all that was necessary. The firm experienced considerable difficulty in enforcing prices, although it felt that since it had a quality line its problem was simpler than that of others.

2. A Coffee roaster:

This firm is a pioneer in the field of price maintenance in the western part of the United States and until it lost a Supreme Court decision was very aggressive in enforcing its prices. Early in 1933 it began to operate in California on a stop price basis without issuing contracts but also dropped its efforts when the code went into effect. It definitely favors price maintenance but doubts the constitutionality of the California law. There were many violations of its prices during its stop price period.

3. A small distributor of coffee, teas and spices. This firm definitely opposes price maintenance, and has had no experience with it. Its attitude may be expressed in the words used by its general manager. "All we are interested in is selling goods. What the retailer gets is not up to us. If he wants to give them away, we don't give a damn."

4. A coffee roaster with national distribution.

(*) All information was obtained on a confidential basis; hence no firm names will be employed except where the information is from published sources.

The Los Angeles district manager of this firm stated that price maintenance is favored but that the firm has made no effort to control resale prices, partly because it doubts the constitutionality of the California statute.

5. A manufacturer of mayonnaise and allied products:

A number of mayonnaise manufacturers for a brief period attempted to stabilize the prices on their products. This particular firm was very aggressive in its attempt, even going so far as to buy double page spreads in the Retail Grocers' Advocate, stating its position and asking the retailers to support its program. (*) However, it was forced to relinquish its efforts and explained its policy as follows:

> "We do this with regret for it has been our constant endeavor to insure profits for the retailer, jobber and the manufacturer. We believed maintaining stop prices would accomplish that result, but competitive conditions, market fluctuations, and a survey which indicated that most retailers did not favor stop prices unless enforced by all mayonnaise manufacturers, compelled us to abandon the policy which we were alone in maintaining. We are ready to consider re-establishing of stop prices when conditions in the industry permit." (**)

This firm stated that sales had increased during the period when the leading coast manufacturers maintained prices because of special dealer attention given to the line. However, it was unable to stand out alone when other lines were cut.

6. A Mayonnaise and Salad Dressing Manufacturer.

This firms' experience and attitude was stated publicly as follows:

> "The Best Foods, Inc. have been and still are strong advocates of a minimum resale price for their merchandise. Our company has held the umbrella for the industry for many years past, and were forced to abolish the stop price temporarily until such time that the manufacturers who are naming a so-called minimum resale price, but not enforcing it as we were doing, show themselves

---

(*) See The California Retail Grocers' Advocate, June 15, 1934, pp. 20 - 21, and July 27, 1934, p. 4.

(**) The California Retail Grocers' Advocate Aug. 1934, page 15under heading "Durkee Announces Policy Change."

sincere in their declaration of policy. As soon as this is evident to us, we shall again be glad to establish our minimum resale price and mean what we say when we declare ourselves accordingly." (*)

7. A manufacturer of vegetable oil products (shortening, salad oil, nut margarine)

In the spring of 1934, this firm began to issue Fair Trade contracts but dropped the attempt after a trial of three months because of (1) difficulty in obtaining dealers' signatures (2) competition of manufacturers who made no attempt at stabilization (3) general disturbed trade conditions. The firm said that competitors were selling to chains and super-markets below cost and it was impossible to maintain their prices under the circumstances.

8. A large manufacturer of canned fruits and vegetables selling in the national market:

This firm does not attempt resale price maintenance and does not consider it feasible in its own circumstances because of the following conditions: (1) the inter-state problem, since it sells in the national market and would find it very difficult to have a variable policy between states (2) the complexity of its channels of distribution with its wide array of products (3) the fact that the prices of its products are influenced by many variable factors such as crop conditions, raw material prices and freight rates. All the firm does is to attempt some persuasion when price cutting gets too rampant in any of its territories.

9. A manufacturer of household bleaching fluid.

Several years ago this firm attempted to control resale prices, allowing jobbers 15% and retailers 30%. The theory was that these margins would be so attractive that the jobbers and retailers would push the product aggressively; the outcome was that a competitor who attempted no control stepped ahead of them. Hence, the firm now opposes price maintenance. Some attempt has been made to establish resale prices in this field but they have refused to cooperate because their chief competitor wished them to come to his level, which they believe would be suicidal for them, since the competitor is better known.

10. A large manufacturer of soaps:

(*) California Retail Grocers' Advocate, June 15, 1934, p. 5 .

Ten years ago this firm became enthusiastic about resale price control and canvassed the trade on the matter. The members of the trade seemed equally enthusiastic so the firm adopted a policy guaranteeing dealers a gross margin of 16 2/3% of retail selling price on its leading product. Two developments broke the system: (1) the large number of violations, especially on the part of small dealers (2) the increase in sales volume of a competitive soap on which there was no control. The firm still approves resale price maintenance in principle but holds that enforcement is very difficult and requires the cooperation of the other members of the trade.

11. A wholesale grocer, importer and tobacconist:

This firm's merchandising policy is unique. It sells three lines of private brand canned goods and coffee, and maintains resale prices on one of these only. The theory is that grocers must have some non-controlled products with which to meet competition. On its controlled brands, however, it allows dealers to advertise five items for special sales with margins as low as 10% on cost. The regular minimum mark-up is 16 2/3 per cent above cost. The firm strongly recommends higher mark-up rates to its dealers. Fair trade contracts are not employed. Enforcement is handled primarily by the salesmen of the firm and by refusal to sell. This firm's policy is exceedingly interesting as an attempt to operate on more than one level at the same time.

12. A large flour milling company.

At present this firm makes no attempt to control resale prices. A few years ago the firm did make such an effort with a packaged biscuit flour. The dealers all seemed enthusiastic that the company was to help them make more money on the item but when it came to actual cooperation "they generally sold a competitors product at a lower price." In addition, the firm was kept very busy trying to restrain violators.

13. A creamery and butter Association.

The association attempted to build dealer goodwill through a scheme of price stabilization. It was forced to abandon its policy because "dealers did not give them the desired support, but quite contrary, have selected other butter brands to substitute and cut for special prices."(*)

14. A large dairy products company:

(*) The California Retail Grocers' Advocate, July 22, 1932, p. 12 .

This firm, when the company above, (see 13) dropped its scheme published the following statement in the California Retail Grocers' Advocate: (*)

> "We have had so many inquiries from grocers relative to the intent of this Company with regard to the continuation of the 'stop price policy' announced last winter, that I am taking the liberty of addressing you on this subject as Secretary of the State Retail Grocers' Association.
>
> "The 'stop price policy' of at least one cent over cost on Golden State Butter will be maintained and as far as possible extended, so that the dealers of Golden State brand dairy products shall make a reasonable profit from handling them.
>
> "From a retail merchandising standpoint, we believe that dairy products are grouping into two classes, namely: 'price brands' and 'profitable brands'.
>
> "'Price brands,' for which there is no consumer acceptance, except that of a price consideration, will of necessity be forced into a position which yields no profit to the merchant, nor to the manufacturer, nor to the dairy farmer. This is not conducive to the reestablishment of normal business activity, but definitely tends to prolong depression. Considering the rapid turnover of dairy products, we believe it worth while for the retail merchant to promote the sale of 'profitable brands', and that the grocer who can maintain the greatest percentage of sales of 'profitable brands' over 'price brands' will come through with the strongest business and the most desirable patronage.
>
> "Having in mind the welfare of our grocery accounts as contributory to our own welfare, we intend to contribute all that we can to a program of profitable merchandising of dairy products."

The policy of this firm is intimately related to the fact that it has had serious opposition from the retail grocers because of direct sales to the home. Hence, it has been making strenuous efforts to court the goodwill of the dealers by this price maintenance plan.

III. Resistances to Resale Price Control in the Grocery Trade.

On the basis of the evidence in the preceding sections derived from

---

(*) August 5, 1932 p.23 .

the experience of the trade plus a priori reasoning it is possible now to indicate the prime reasons for the slight amount of resale price maintenance in the grocery trade. These reasons are found in a number of serious resistances to the operation of resale price control plans. The resistance must be classified into two groups in order to indicate their qualitative differences: (1) those of a potentially ephemeral nature (2) those of a permanent quality. The potentially ephemeral resistances constitute those that are derived either from current attitudes, current knowledge, or temporary conditions subject to change in the future. However, it need not follow that they will actually be modified; conceivably some of them may even become aggravated. The resistances of a permanent quality are so deeply imbedded in the conditions and characteristics of the trade as to represent more fundamental threats to schemes of price control.

1. Potentially Ephemeral Resistances

The resistances that may represent merely temporary barriers may be enumerated as follows:

1. Lack of knowledge of the Fair Trade Law. The majority of dealers and many manufacturers and distributors have no knowledge or merely a very hazy, vague knowledge of the Fair Trade Act.

2. The contention that the law is unconstitutional. Without doubt a considerable number of manufacturers and distributors take no active interest in the law because they feel that it may soon be declared unconstitutional.

3. The presence of the NRA code. During the period of the code a number of firms that had attempted resale price control dropped their plans because they deemed the code stop loss stipulation adequate.

4. The Unfair Practices Act. At present without doubt trade interest is focussed upon the Unfair Practices Act as a procedure that appears more advantageous, all factors considered.

5. The lack of pressure from dealers. Resale price maintenance derives its vitality primarily from the organized, coercive influence of the retail interests. This influence has been almost negligible in California to date.

6. Lack of Cooperation among manufacturers and distributors. Effective resale price control can be derived usually only out of cooperation among the suppliers of products in the same class. The experience of the trade has been that any given manufacturer assumes a tremendous risk, as well as responsibility when he ventures alone. To date, members of the trade have not indicated a sincere willingness to cooperate in establishing uniform policies.

7. Lack of leadership. Next to the pressure from the retailers, the

quality of leadership is the most important factor. The grocery trade has demonstrated that it possesses able, aggressive leaders; however, the attention and energy of these leaders have been directed toward other problems such as the anti-chain tax, and the Unfair Practices Act.

8. Unsatisfactory experience, Price maintenance, because of its ineffectuality in the past, has left a poor savour in the trade, which is a serious handicap.

9. The inter-state problem. As long as California stood alone, many larger firms considered operation under the Fair Trade Act unfeasible because of the ease of obtaining supplies outside the state, and because of the nuisance of having variable policies between states.

10. The trade custom of "specials". In the grocery trade there is a deeply rooted custom of featuring specials in advertising. Well-known advertised brands make the best specials; hence, there is great resistance to freezing them at any given point.

2. Permanent Resistances.

Among the more permanent resistances there appear:

1. The inherent nature of many food products. Many food products must be sold under conditions of relatively flexible price adjustments. These adjustments may be traceable to perishability, to the close short run dependence of retail prices upon prices in the primary markets, to changes in freight rates or to other insistent, immediate factors. The fact that foods bulk so highly in the consumer's scheme of things makes price an extraordinarily important element determining purchase hence there is great pressure from consumers upon dealers. Seasonal factors, also, frequently enforce short run price adjustments. For those items in which short run price flexibility is essential it is exceedingly difficult, if not impossible to operate a system of price maintenance. Without doubt a significant factor influencing all the above considerations is the fact that raw material and factory costs of production constitute a much larger proportion of selling price than in the case of some commodities, as drugs.

2. The numbers of dealers, wholesalers and suppliers in the trade. There is very intimate relation, other factors being equal, between the relative numbers in a trade and the interest in, and feasibility of price maintenance. Both the grocery trade and the tobacco trade are made up of a large number of outlets. Consequently the problem of policing dealers as well as that of obtaining and maintaining cooperation among competitive suppliers in the same commodity class are exceedingly difficult of solution.

3. Closely related to the relative number in the trade is its relative complexity. Complexity is a factor of (1) the variety

in the structure of the trade (2) the variety of products (3) the degree of indirect selling (4) the extent of inter-outlet competition. All of these factors complicate the grocery field. The structures of the trade in the retail business contains tremendous variety, including small specialists, general stores, chain stores, cooperative groups, voluntary chains, department stores, super-markets, large institutional buyers, eating places and miscellaneous types as well as wide qualitative differences within each type. A similar condition exists in the wholesale trade, except that a general tendency toward direct selling in recent years has tended to simplify the channels of distribution. The wholesale business, however is extraordinarily complicated by variations of type and by contractual relations (*) of a variable quality. The general trend toward direct selling, although it has simplified the labyrinth of distribution has not similarly simplified the problem of price maintenance insofar as it has arisen out of the chain store growth for these organizations, usually resist price control. It is needless to over-stress the obvious variety of products in the food field. The prime difficulty from the standpoint of price maintenance is (1) the lack of trade marking and branding for many food commodities of a staple quality allowing these non-branded items to be used as loss leaders in case the nationally advertised lines become controlled ( ) the large number of private brands and the general ease of access to unidentified merchandise for private label purposes. Consequently, the effect of resale price control are intricate and very likely would frequently show themselves in a strengthening of private brand and unbranded items. Also, there is the fact that many advertised packaged grocery products are excellent loss leader items. This is a condition that to some extent leads to a demand for price control; likewise, it is a resisting influence insofar as the cutters prefer to employ these well-known brands. Finally, there is the matter of inter-outlet competition. Groceries are sold in many types of outlets under diverse conditions. A grocery product that is part of the main line of a specialist may be merely a side line to another type of dealer. This condition of inter-outlet competition is further aggravated by a wide range in equipment and services between firms in the field; consequently any attempt at standardization of prices and margins would lead both to definite resistance and to the introduction of compensatory influences in other directions.

4. The private brand threat. Private branding was mentioned above but is sufficiently important for separate treatment. The brands of chain stores, wholesalers, cooperative and voluntary chains and some of the larger dealers are already thoroughly entrenched. The constant pressure and threat of these brands makes manufacturers who are selling on an identified, branded basis

---

(*) For a detailed review see the writer's discussion "Trends in the Wholesale Grocery Trade in San Francisco" in the Harvard Business Review, July, 1930.

---

exceedingly wary about any schemes that might give any advantage to these actual or potential arch competitors. The situation unfortunately, is not clear cut. It is claimed by many that at present, prices are slashed on well-known national brands in order to lure customers into the stores to sell them privately branded merchandise. Also, it is held that dealers put pressure upon private brands because of the presence of profit in the handling of the well-known brands that are used as leaders. There is much evidence to support both of the above propositions. Conversely, it seems equally true, that with the prices of national brands stabilized, the price cutters and the chain stores, super-markets and large scale distributors in general would be forced to stress their private brands in order to obtain a differential position in the market. It seems to the writer that neither of these general propositions nor their application with respect to any given item or line is subject to precise quantitative formulation or prediction for the outcome should be highly variable between firms. Two considerations stand out: (1) stabilized advertised brands provide ideal standards of comparison for those who wish to push private brands (2) many advertised brands probably could maintain and improve their position by increasing advertising and selling expenditure and by the aid of the goodwill of many independent merchants. Although it is exceedingly difficult to be certain of the proper conclusions, the writer inclines to the belief that many private brands would expand their sales under conditions of resale price control because of the dominance of the economy price element in consumer buying of groceries.

5. The strength of the interests in opposition. Arrayed against resale price maintenance on the whole are the limited and non-service outlets, the price cutters, the chain stores, the super-markets and the grocery departments attached to department stores. The volume of sales on these outlets is so large that manufacturers will be exceedingly wary about employing a practice which might antagonize them causing a loss of their business or which particularly might lead them to push their own brands or non-controlled lines. A voluntary, permissive scheme or resale price maintenance would of necessity gain its power only from a sufficiently well organized, coercive demand from the balance of the retail trade.

What is the conclusion of this problem? Here, as in so many instances in the field of social science one cannot measure closely or predict accurately; rather one must weigh carefully and lean only as far as logic allows. The weight of the evidence and reasoning, as far as the writer is concerned, points to the conclusion that resale price maintenance as a permissive scheme cannot have wide application in the food field. Here and there, individual suppliers who are particularly powerful or have simple, direct relations with their dealers or find cooperation with their competitors easy, or are without a serious private brand - may operate successfully on this basis. However, voluntary, vertical price control does not seem feasible for the bulk of the trade under present conditions. This conclusion is re-enforced by the fact that in Great Britain with broad, legal rights, resale price maintenance is relatively weak and ineffectual in the grocery trade. (*)

(*) cf Grether, E.T., Resale Price Maintenance in Great Britain Sect. V.

CHAPTER IV

DEVELOPMENTS UNDER THE UNFAIR PRACTICES ACT

I. The period Prior to 1935.

The anti-discrimination act of 1931 and the sales below cost act of 1933 which provided the core of the Unfair Practices Act of 1935 (see above pp 26-29) were invoked only a small number of times in the period prior to 1935. In the city of Fresno in the spring of 1932, a chain store was convicted of varying prices between stores within the city for the purpose of destroying competition. According to the evidence offered, one unit of the chain was selling Ivory Snow two packages for five cents at the same time other units were selling it at thirteen cents a package. It was alleged that the purpose of this variation in prices was to beat the advertising of an independent competitor who had offered to sell the same product at two packages for twenty-five cents. (*) The ruling of the lower court was affirmed on appeal to the Superior Court.

The 1933 sales below cost act was used more largely as a potential threat and in an educational manner than in prosecution on the courts. There was considerable publicising of the penalties of the act together with conferences with members of the trade who were deemed to be violators. However, a small number of attempts at prosecution appeared. The first case in which the defendant was held guilty was that of a dealer in southern California who had sold butter at five cents a pound in combination with other articles at a time when the average wholesale price of butter was twenty-one cents a pound. This verdict was entered by a jury of nine women and three men in a Justice of Peace court. (**)

In the prosecutions and in the persuasive work among the members of the trade only sales below invoice cost were considered violations of the law. In a number of instances, attempts at prosecution failed because the "cutters" were unable to produce their invoices. In another instance, prosecution failed because of lack of agreement that there was "intent to destroy competition" as well as for lack of evidence of sale below cost. (***) In another instance, an injunction was granted against a firm in San Francisco for violation of Code of Fair Competition of the Retail Food and Grocery Trade and for violation of the sales below cost statute. (****)

(*) See the California Retail Grocers' Advocate, Dec. 25, 1931, p.8; March 11, 1932, pp 11,13,17; July 8, 1932, p.5.

(**) See the California Retail Grocers' Advocate, September 29, 1933, p. 7.

(***) The Commercial Bulletin, February 1, 1935, p. 1, in a news item headed "Dismiss Loss Leader Charge Against Smith."

(****) See the California Retail Grocers' Advocate, June 15, 1934, pp 7 and 8.

II. The period following the passage of the 1935 Act.

Late in the summer of 1935 it became clear that the food business as well as other lines in California were being organized for a large scale effort to stabilize prices under the provisions of the Unfair Practices Act. This movement is still too recent to allow any proper evaluation; the information that follows should be taken merely as tentative indications of the trend.

Early in the summer already the grocers in southern California organized the Southern California Food and Grocery Bureau, patterned after the old code authority to police the business. Shortly thereafter, a similar movement appeared in northern California. The writer does not have adequate details concerning the status of the southern organization. In the northern part of the state two organizations are now in operation: (1) The Food Trades Institute, sponsored by the state association (2) The Food Industry Bureau in Alameda and Contra Costa counties and advertised as "succeeding the food and grocery code authority." The purposes of these two bodies and others that appear to be springing up are: (1) to interpret the Unfair Practices Act to the trade (2) to receive complaints of violation (3) to endeavor to settle cases raised in an amicable fashion through persuasion and (4) when necessary to take legal action. The bureaus are supported by assessments similar to those under the code. In fact, operations apparently are following the code model in great detail even to taking the code 6% loss limitation provision as the proper figure for cost of doing business. Whether this figure is merely tentative and will be replaced eventually by others obtained through cost surveys as mentioned in the Act remains to be seen.

It seems that the agencies that are springing into existence to operate under the Unfair Practices Act intend to rely primarily upon persuasive and educational [illegible] to adjust the difficulties that arise, with occasional court cases to demonstrate the coercive power of the Act.

Sufficient time has not elapsed as yet to know what the legal outcome will be. A small number of cases have arisen in the courts. In an instance in Los Angeles in the Superior Court a market was enjoined from selling any of its products below cost plus overhead. (*) Another violation, so it was stated, would call for prosecution for contempt of court and make the firm subject to fine and imprisonment. The most significant aspect of this case is that Judge J. T. B. Varne interpreted the law literally and ruled that the defendant must include all the costs of doing business enumerated in the Act.

In northern California a number of cases have been filed. For instance, a complaint has been filed against a market in Oakland. This

---

(*) Bulletin #1, August 28, 1935 of the The Food Industry Bureau, C. Fred Verleger, Executive Secretary. See also the California Retail Grocers' Advocate, August 30, 1935, p.5.

organization immediately bought advertising space to tell its side of the case to the public. It claims that it is paying higher wages than asked under the NRA and is operating an efficient business making a fair profit. It did not, in its advertising, attempt to reply to the specific allegation concerning sales below cost. (*)

A second complaint against another firm was filed late in October in Oakland. One of the markets of this firm employed a full page advertisement in the Berkeley Shopping News, November 8, 1935 to state its position. It raised the following specific questions: "What is the cost of doing business on a particular article, singled out of the thousands of articles that the Lucky Markets handle? Is it the average? Does the same minimum mark-up apply to fresh meats, to fresh fruits and vegetables, to delicatessen and to dry groceries? Does it apply to bread, milk, eggs, butter, flour and other commodities which every family consumes daily, as well as to the foods which are not necessary to the average household?

Late in the fall complaints were being filed in many parts of California. Very likely, early in 1936 there should be sufficiently significant developments to allow sounder evaluation than at present. Under the circumstances it seems somewhat futile to speculate concerning the legal possibilities. It may not be an undue bit of prediction, however, to repeat what was stated in the section where the law was interpreted: viz., that the law may have a large amount of application if it is interpreted in such a way as to make its effect merely that of a loss limitation provision. On this basis, considering the latitude of the powers granted, it can be made more effective even than the NRA code. However, if the section of the law enumerating operating expenses is interpreted too literally, then it seems probable it may shortly fall of its own weight both because of legal difficulties and the question of it's wisdom, economically.

(*) See the Berkeley Gazette, October 18, 1935; advertisement by Housewives Groceterias.

CHAPTER V. DEVELOPMENTS IN THE DRUG TRADE

1. The Period Prior to 1933.

It would be possible to carry the review of attempts at resale price control in the drug trade back into the end of the last century and into the first few years of this century prior to the passage of the Cartwright Act, the anti-trust law of the State of California. However, for the purposes of this study only the immediate history is essential. In the first section of this study only the immediate history has been sketched; the interest at this point is in trade developments. In the period after 1909, following the passing of the Cartwright Act a small amount of formal resale price maintenance appeared in the drug trade. As far as has been ascertained no detailed account of these individual, scattered attempts is available in published form, except in those few cases where there was court action. It does not seem likely that much of value could be found by an intensive combing of this period.

The passage of the Fair Trade Law in 1931 not only reflected a renewed interest but aroused an enlarged interest. The great depression beginning in 1929 had lengthened into its second year and was producing its typical repercussions of price cutting in the retail trades. One misinterprets the quality of the demands for resale price control as far as retailers are concerned when the problem is approached merely as a depression phenomenon for its roots lie earlier and rest more deeply. However, the relative intensity and vigor of the demands and the type of economic theorizing which arose to rationalize these demands are intimately linked with the deep and lengthened business slump. The origins of the outcry for resale price maintenance in the drug trade are found in the conditions of the last quarter of the preceding century when branded proprietary drug products and large scale advertising intruded into the drug and chemical business, in a large scale fashion, as well as in the normally intense nature of competition in the retail business. But it was the dominant price emphasis of the depression and the shift of consumers towards firms that actually or allegedly sold at cut rates that brought the issue to its legislative and trade focus.

The Fair Trade Law of 1931, although it expressed this increased interest produced no significant new developments. The reasons for the lack of use of the law apparently were: (1) the inherent quality of the statute as a voluntary, permissive contractual act, (2) the lack of control over dealers who refuse to sign, (3) the ease of access to supplies outside the state, (4) the full depression influences were not as yet effective, (5) manufacturers on the whole were more interested in volume than in stabilizing the retail market, (6) the absence of an organized, concerted effort in the retail trade to exert pressure upon manufacturers to operate under the Act.*

(*) Cf. Warnack, R. S. The California Fair Trade Act, pp. 8 and 9.

Among the first, perhaps in fact the first firm, to make use of the act was the Dr. Miles company of long-established price maintenance fame. This firm organized a California subsidiary under the law, issued contracts and refused to sell to retailers who did not sign, and claimed to have achieved practically complete coverage of the trade. On the wholesale end, it shipped on consignment thus maintaining control over its products.* Yet few firms followed this lead. It soon became clear that under the existing conditions the amount and quality of resale price control would be little affected by the 1931 statute.

II. The 1933 Amendment

However, neither conditions in the trade nor the act remained static. It is useless perhaps to speculate too closely concerning cause and effect. The lengthening shadow of the depression may have produced the conditions which made the passage of the 1933 Amendment possible; conversely, this amendment, once on the statute books, gave the stimulus to the large significant movement which appeared. Perhaps the most important role of the amendment was the basis it gave for organization among the members of the retail trade to insist upon action from manufacturers. Retailers knew that they now had a bludgeon which could be made effective upon manufacturers who had been in opposition, lukewarm and apathetic, or skeptical, and who had argued that the 1931 statute was too ineffective. This is not to say that manufacturers were entirely disinterested for a small number of large national distributors were attempting to stabilize conditions in the retail business. However, the great majority of manufacturers had no direct, individual incentive to operate under the act. Without doubt, if there had been a keen interest among manufacturers, many more of them might have found that the rights granted under the 1931 law would have allowed a large measure of effective control. This general absence of activity and other evidence to be advanced later leads one to believe that price maintenance as a large-scale program would not have appeared to date if it had depended upon the uninfluenced desires of the majority of individual manufacturers.

(*) cf The California Retail Grocers Advocate, Oct. 30, 1931, p.29

III. Trade conditions in 1933

To appreciate fully the occurrences leading to and immediately following the 1933 Amendment it is essential to examine conditions in the retail drug business at that time. "Cut-rate" selling had become the dominant note in the Los Angeles and San Francisco metropolitan areas. It seems a fair generalization that there was an irregular wave-like influence propelled from these centers which finally lost itself in rural centers and to some extent in the smaller, independent stores even in metropolitan areas. This tendency towards reduced retail prices was a reaction both to the depression and to the growing vigor of newer retail types which thrived under depression conditions. In the larger metropolitan centers there had arisen in recent years a large number of firms that stressed price and eliminated as much merchandising service as possible. The price conscious consumers of the depression years flocked to these enterprises in increasingly larger numbers, willing to dispense with miscellaneous services and reputation and convenience in purchase. Unfortunately, however, the advertising and selling stress of these firms also produced practices that interfered with the efficient performance of limited service merchandising. Advertising in the newspapers became filled with improper statements of comparative value; likewise, there was much offering of "bait" merely for purposes of luring customers to the stores. That is, healthy price cutting became tinged to a degree that it is impossible to measure, with price cutting and price offering, of the quality of unfair competition. These practices eventually found their haven of complaint in the offices of the code authorities.

It should be made clear that the intent at this point is to describe conditions and to interpret a movement and not to evaluate it economically. Price reductions are, and should be, essential and normal concomitants of periods of business decline. Also, the development of uneconomical and unfair pricing practices and of measures to bolster and stabilize the price structure appear to be equally "normal" reactions to a long-continued period of decline.

The conditions in the trade with respect to prices in 1933 and early 1934 may be indicated by a number of special cases and regional studies. Unfortunately, an analysis of advertised prices in Los Angeles in 1933 is not finished and cannot be included in this report. Among the members of the trade in the state it is the opinion that prices were lower in Los Angeles in 1933 than in any other part of the State.* For the purposes of this report only one small illustration in Los Angeles is available as yet. In November, 1933, a Los Angeles retail drug firm famous as a price cutter, in three advertisements in the Los Angeles Evening Herald advertised seventeen articles below wholesale list. These seventeen articles varied from 52.9 percent of the wholesale list to 88.6 percent; the arithmetic average was 74.2 percent. That is, this particular firm for these items was offering to sell from 47.1 percent to 11.4 percent below the regular wholesale price; on the average it had cut 25.8 percent below wholesale.

(*) Typically, prices are somewhat lower in "normal" times in the Los Angeles area than in the San Francisco area.

An isolated example of a San Francisco firm reflects conditions in the same period in the northern city. (See Table 1.) In this instance, comparison with the recommended prices of the Northern California Retail Druggists' Association is also possible. It will be noticed that only eight items were offered above the regular wholesale list, only six at wholesale and ninety-two below wholesale. The arithmetic average of the prices of the 106 items was 11.9 percent below the regular wholesale list. It will be noticed also that the advertised prices averaged 36.9 percent below the then recommended prices of the Retail Druggists' Association.

Conditions in San Francisco are portrayed more clearly by a general study. (See Table 2.) This study was based upon a collection of all prices of drug products advertised in the San Francisco Examiner, one issue each week, for the first six months of 1933. In order to make it possible to make comparisons with contractual prices under the California Fair Trade Law, only those products were selected which in July 1934 were under contract. Table 2 make possible comparisons with the stated prices (i.e., the prices from which the firms alleged they were cutting) as well as with 1934 contractual prices. It should be noted that in this particular study all advertised prices were employed, not merely those of selected price cutters. It will be noticed that for the 134 products, the 706 price quotations in 1933 averaged 75.75 percent of the 1934 contractual prices. The stated prices averaged 127.79 percent of the 1934 contractual prices. That is, the 1934 contractual prices stood approximately half-way between the alleged prices and the actual prices of the advertisers. It is exceedingly interesting to notice, too, that the actual prices were 60.11 percent of the stated prices; i.e., on these items advertisers were claiming to be cutting prices about 40 percent.

Table 3 represents a similar study for the city of Stockton, California for the same period. In this instance the actual prices were not quite as low as in San Francisco; viz., 79.48 percent of 1934 contractual prices contrasted with 75.75 percent in San Francisco. The stated prices also were slightly lower, averaging 124.61 percent of 1934 contractual prices contrasted with 127.79 in San Francisco. Likewise, the amount of the alleged price reduction is not so large for Stockton advertisers claimed to be cutting only 35.66 percent.*

Although it is a serious error to interpret the origins and long-continued demands for resale price maintenance in terms of depression influences, it does seem clear that the vitality of the movement in California in 1933 and thereafter is accounted for by the serious break in advertised retail prices. It is impossible to give a measure of the general price situation because of qualitative factors that were present. Particularly important and impossible to portray statistically is the extent to which margins were maintained or widened or narrowed on items that were not advertised. Most difficult to demonstrate is the estent to which non-standard merchandise was being sold. However, there seems little reason to doubt the conclusion that the general impact of the

(*) Probably the Los Angeles prices will average lower with larger alleged reductions and that smaller reductions and alleged reductions were prevalent in smaller centers. Proof or disproof must wait until the studies are completed.

TABLE I

COMPARISON OF THE ADVERTISED PRICES OF A SAN FRANCISCO PRICE CUTTER IN 1933 WITH THE CURRENT PUBLISHED WHOLESALE PRICES AND WITH THE PUBLISHED RECOMMENDED RETAIL PRICES OF THE NORTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION

Date of Advertisement	Number of Drug Products	Price Level			Average percentage of cut prices above or below wholesale	Average percentage margin of druggists recommended prices (fig'd. on Ret. Sel'g. price)	Average percentage reduction of advertised cut prices below druggists' association prices
		Above Wholesale	At Wholesale	Below Wholesale			
Aug. 10, 1933 S.F. Call Bulletin	15	5	1	9	-9.6%	31.4%	35.5%
Sept. 7, 1933 S.F. Call Bulletin	26	0	2	24	-13.3%	29.7%	37.4%
Sept. 10, 1933 S.F. Examiner	26	0	1	25	-13.7%	29.5%	37.5%
Oct. 15, 1933 S.F. Examiner	39	3	2	34	-10.6%	30.3%	36.7%
Total (1)	106	8	6	92	-11.9%	30.1%	36.9%

Source: Prepared by E. T. Grether.

(1) Total percentages are aggregate averages.

TABLE II

COMPARISON OF ADVERTISED PRICES ON DRUG PRODUCTS IN SAN FRANCISCO, CALIFORNIA DURING THE PERIOD JANUARY 1 to JUNE, 1933 WITH 1934 CONTRACTUAL PRICES FOR IDENTICAL ITEMS

(Prices taken from advertisements in the San Francisco Examiner)

Classes of Products	Number of Products	Number of Quotations	Percentage of Average Stated 1/ prices to contractual prices	Percentage of Average actual prices to contractual prices	Percentage of Average actual prices to stated 1/ prices
Antiseptics	9	58	124.74	79.35	63.46
Cod liver oils	9	38	120.08	81.85	68.51
Cosmetics	25	100	127.37	72.30	57.42
Dentrifices	6	49	133.66	89.34	65.21
Deodorants	6	33	117.05	77.56	66.13
Effervescent Salts	5	29	129.61	75.20	58.36
Eye preparations	3	9	115.44	73.99	64.47
Foods, Tonics and Digestive Aids	2	4	113.66	69.08	58.46
Food preparations	3	16	112.73	73.78	65.71
Hairdressing preparations	14	54	140.85	84.03	63.35
Hospital Supplies	1	1	100.00	50.00	50.00
Laxatives	4	11	107.78	76.33	71.22
Liniments	2	4	119.66	72.64	60.71
Mineral Oils	2	10	141.55	86.86	61.19
Ointments	4	16	114.72	63.62	55.23
Patents	7	27	119.81	73.40	61.50
Pharmaceuticals	1	1	166.67	78.67	47.20
Pills, Tablets, Capsules	8	49	126.86	74.49	59.35
Salts	1	26	107.59	52.34	48.64
Shaving Supplies	15	98	139.32	75.81	54.48
Soaps	3	36	125.23	62.26	48.05
Sundries	4	37	138.51	65.77	48.61
Totals 2/	134	706	127.79	75.75	60.11

1/ - The stated price is the price from which the advertiser alleged he was cutting; the actual price is the price at which he was selling.

2/ - The total percentage is an aggregate average.

Source: Prepared by E. T. Grether.

factors, whether entirely demonstrable or not, was so drastic as to enforce a sincere willingness to cooperate among the majority of retailers in an effort to stabilize conditions. It seems extremely unlikely that an equivalent group effort could have arisen and maintained itself during normal times.

TABLE III

COMPARISON OF ADVERTISED PRICES ON DRUG PRODUCTS IN STOCKTON, CALIFORNIA DURING THE PERIOD JANUARY 1 TO JUNE 30, 1933 WITH 1934 CONTRACTUAL PRICES FOR IDENTICAL ITEMS

(Prices taken from advertisements in the Stockton Record)

Classes of Products	Number of Products	Number of Quotations	Percentage of Average actual prices to the average stated1/ prices	Percentage of Average stated1/ prices to the contractual prices	Percentage of Average actual prices to contractual prices
Antiseptics	8	21	67.17	123.75	84.14
Cod Liver Oils	3	12	67.78	113.41	80.94
Cosmetics	15	29	68.18	124.93	82.52
Dentrifices	9	26	67.33	127.77	85.17
Deodorants	7	27	62.50	120.67	74.87
Effervescent Salts	6	12	57.19	113.02	73.19
Eye Preparations	2	3	63.37	117.01	77.53
Foot Preparations	1	6	72.57	112.90	77.42
Hair Dressing Preparations	6	16	65.74	126.51	82.92
Hospital Supplies	2	3	73.20	105.15	76.67
Laxatives	3	9	64.35	98.54	64.02
Mineral Oils	1	1	84.00	127.11	106.79
Ointments	7	11	60.71	115.56	70.65
Patents	3	5	65.32	114.38	74.91
Pharmaceuticals	2	4	73.33	114.19	83.55
Pills, Tablets, Capsules	11	23	64.47	117.02	74.69
Salts	4	15	61.37	124.02	53.66
Shaving Supplies	9	19	60.73	145.74	83.49
Soaps	2	2	58.00	167.67	96.67
Sundries	9	27	62.95	137.37	73.33
Totals2/	110	271	64.34	124.61	79.48

Source: Prepared by E. T. Grether.

1/ - The stated price is the price from which the advertiser alleged he was cutting; the actual price is the price at which he was selling.

2/ - Total percentage is an aggregate average.

IV. The Period of the N.R.A. Code

The vigorous movement for resale price maintenance matured throughout the period of the N.R.A. code. It is entirely reasonable to raise the question of the reason for this development since it might be assumed that the operation of the code would have removed the basis of the resale price control demands. On the contrary, the retail code seems to have accentuated, rather than allayed, the demands for resale price control as far as the retail trade was concerned. In the first place, retail druggists were for the most part dissatisfied with the provisions of the retail code. They had fought for provisions which would have included a considerable margin in minimum selling prices. (*) Hence, the loss limitation provision which fixed the minimum at delivered wholesale price seemed a weak compromise. In the second place, in California, and especially in Southern California, there was tremendous dissatisfaction among the majority of retail druggists with the quality of the enforcement of the code provisions. A list of alleged violations charged against two firms by the Los Angeles Metropolitan Retail Drug Code Authority in the spring of 1935 well illustrates the basis of the attitudes of the groups in the trade: (**)

"Assertedly advertising 50¢ size Colgates Shaving Cream for 18¢ but selling the 25¢ size instead at the advertised price.

"Assertedly advertising (but not selling) large Zilaton Tablets for 40¢ per bottle.

"Assertedly selling 16 oz. Lacto Dextrin at 67¢ though the stop price 89¢.

"Assertedly selling Kolynos Tooth Paste at 30¢, though the stop price was 35¢.

"Assertedly selling Ever-Dry Deoderant at 67¢, though the stop price was 89¢.

"Assertedly advertising and selling double size Palmolive Shaving Cream and double size Colgate Rapid Shaving Cream for 29¢ each, though the stop price on each was 31¢.

"Assertedly selling Life Buoy Shaving Cream at 21¢, though the stop price was 25¢.

"Advertising White Vaseline at 4¢ and substituting Lepeco Petroleum Jelly without due notice and/or consent of the customer.

"Asserted selling a substitute for vaseline, advertised in the Los Angeles Evening Herald and Express at 4¢ a jar, though the stop price on vaseline itself was 7¢.

"Assertedly advertising (but not selling) Nu-Jol, SSS and Frostilla at 34¢, 69¢, and 34¢, respectively, all below stop prices."

From the standpoint of the majority of the members of the trade alleged violations as in the above list were not adequately curbed; from the standpoint of the alleged violators, undue attention was focussed upon their affairs to the neglect of the mass of dealers.

In the third place, the relative brevity of the code period makes it impossible to know what the ultimate outcome might have been. It

(*) For details, see Part II, Chapters III and IV of this report.
(**) Taken from the West Coast Druggist, March, 1935, pp. 5 and 6.

is possible that the trade eventually might have become more contented under code regulations. In the fourth place, the code did provide the pattern and occasion for bringing the members of the trade together into organized expression; upon this organization it was possible to build the larger demands for resale price control as well as for the Unfair Practices Act.

V. The attitudes towards and experience with resale price control on the part of members of the trade.

A. Retailers

In the summer of 1934, one hundred retail druggist were interviewed in the San Francisco Bay Region, fifty in San Francisco, and fifty in the East Bay area. In this survey, there was no attempt at selectivity; i.e. the interviewer talked to dealers in each district as he was given opportunity. As it happened, practically all the dealers who gave their opinions were independent pharmacists; hence, the survey largely expresses the stated opinions and attitudes of independent druggists in the San Francisco Bay region in the summer of 1934. (*)

There is no room for doubt concerning the opinions and attitudes of these dealers. They expressed themselves unanimously in favor of resale price maintenance. Likewise they were equally unanimous in their support of the California Fair Trade Law. It is exceedingly significant by way of contrast to the grocery field and in relation to the quality of the organization of the trade, that all of these dealers were informed of the law. Ninety-two percent stated that they were actively involved in supporting the movement for resale price control. Ninety-four percent stated that they pushed the goods of manufacturers who controlled prices more than uncontrolled products. The methods most frequently employed for pushing controlled items were: window and counter displays, personal recommendations and suggestions, and advertising. On the other hand, uncontrolled items, it was stated, suffered not only from the aggressive attention given those under control, but by removal from display (even concealment), and refusal to purchase. This group of dealers gave every indication of knowledge of the law and active partisanship in furthering its use by manufacturers and wholesalers. Also, the majority of the dealers (84 per cent to be exact) appeared fairly well satisfied with the quality of enforcement of prices under contract. However, there was some dissatisfaction with enforcement and with the width of the margins allowed retailers.

A few of the comments obtained from individual dealers are reproduced below in order to add meat to the bones of the above summary:

Dealer 1. Medium class, independent.

This dealer had two complaints: (1) that margins were often too low under contracts; (2) that some manufacturers used Fair Trade Contracts for bally-hoo purposes and did not attempt to enforce them.

(*) In the grocery section the results of a similar survey among grocery retailers were given.

Dealer 2. Medium class, independent.

This dealer reiterated the same views as in the interview above, but added that discontinued packages were a means of subterfuge and caused difficulty. For instance, recently a cosmetic manufacturer placed its product in a new garb; immediately the old package (but with the same product) was cut by a local department store creating difficulty for dealers who were attempting to sell the new package at a regular price.

Dealer 3. Medium class, neighborhood store.

This dealer was decidedly in favor of price control primarily because of the handicaps of the neighborhood pharmacists. He stated that the downtown and department store operators carried only the fastest selling items instead of comolete stocks, and that neighborhood stores cannot afford to sell as cheaply. He stated that margins on items must be 33-1/3 per cent for the neighborhood store.

Dealer 4. Medium to upper class, neighborhood store.

This dealer stated that the majority of professional lines were on a controlled basis, but that the difficulty arose with the commercial (non-ethical) lines that didn't care how they acquired their business.

Dealer 5. High class, neighborhood store.

This dealer at the time was holding a prominent official position in the retail drug trade. He held that enforcement of contracts was haphazard and listed sixteen manufacturers who were not living up to their contractual agreements.

Dealer 6. Medium class, neighborhood store.

This dealer felt that the high level of intelligence of druggists and their fine organization gave them an unusual opportunity for cooperation in controlling prices. He felt that manufacturers were too loathe to give adequate margins because they wished their goods sold at the lowest prices.

Dealer 7. Medium class, downtown independent dealer.

This dealer stated that cut-rate stores were extremely difficult to control because they were banded together in a national organization to assist each other in opposition to price control wherever it occurs.

Dealer 8. Medium class, neighborhood independent.

This dealer felt that conditions were greatly improved under the California Fair Trade Law but that there was still too much laxity in enforcement. He stated that large druggists were able to buy below the market from "pirate" jobbers and "bootleggers". Also, that he was able to buy some items for stock from a local department store at lower prices than at wholesale. He showed the interviewer his invoice for a toilet

soap,--6 bars for 28¢-- and then pointed to a chain store advertisement where it was being offered at 3 bars for 14¢.

Dealer 9. A large, well-known price cutting institution. (*)

This firm sells for cash with limited service and equipment; according to the head of the firm in recent years its operating expenses have ranged from 12½ to 13 per cent. In addition to having eliminated the "frills" in selling it puts all the pressure possible upon the resource markets to buy as cheaply as possible. Also, it has built a reputation as a source of sale for distress merchandise; consequently, it is offered a great deal of merchandise by manufacturers, wholesalers and even other retailers below the regular prices. It also is a heavy buyer of bankrupt stocks. This dealer feels that he serves a distinctive market which the majority of dealers cannot properly obtain and which does not compete with them. He argued that many of the firms that were now working for resale price control were originally price cutters; that once having become established they became "respectable" and changed their tactics. As examples, he gave a large local department store and a local chain system. This firm's volume increased decidedly during the depression. The firm has signed no Fair Trade contracts but is able to obtain merchandise if it does not cut prices. In those cases where price cutting is impossible it is now pushing privately branded merchandise. The head of the business stated that it was possible for them to establish their own brands if forced to do it. The point of view of the head of the firm might be summed up in his own words: "One thousand small druggists want me to do business as they do, -- but this is an entirely different type of institution."

In December, 1934, and January, 1935, 62 retail druggists were interviewed in Los Angeles. In this survey, particular stress was laid upon an attempt to obtain statements of opinion from firms that were known as price cutters in the trade. In Los Angeles, as in San Francisco, all of the dealers recognized the problem, and were informed concerning the law. Among the 62 firms interviewed, only seven expressed themselves in opposition to resale price maintenance; all of these firms were in the class commonly dubbed "pine board stores" by the trade, with four operating more than one store. If actions speak louder than words then six additional firms in this class should be considered in opposition, for they were at the time aggressively cutting prices even though they stated they preferred control. Without exception, the higher and middle class firms favored price maintenance. The same attitude that was expressed with respect to the general question of resale price maintenance showed itself in the question concerning the California Fair Trade Law. Forty-one of the firms stated that they were giving specific support to price maintenance both through associational endeavor as well as through putting aggressive attention behind controlled items (as in San Francisco). This group also was concentrated outside the limited service, price cutting institutions. In contrast with San Francisco, however, there was general dissatisfaction with the quality of enforcement. The dealers who favored resale price maintenance were unanimous that only a small number of manufacturers and distributors at

(*) This interview was not summarized in the tabulation above, but was made at a later date by the writer, personally.

this time were enforcing their prices effectively; the dealers in the opposition, considered that enforcement was largely non-existent.

So much for the general picture. In addition, it may be well to sketch in significant details by recording a few of the separate interviews:

Dealer 1. High class, independent.

This dealer favored price control, but complained about the small margins under some contracts. For instance, he had just received a new contract for a dentifrice company in which the new stop price was 38¢ and the post cost him nearly 36¢. He stated that he would not sign on this basis. Also he complained bitterly of secret rebates and discounts given to the large chains. He stated that one of the local chains had ruined the local business for several whiskeys by cutting the prices so low that the smaller dealers refused to handle these brands. This chain, for instance, was selling whiskeys at $2.91 a fifth which cost small dealers $3.15.

Dealer 2. Small, medium class independent.

This dealer spoke for price control but said that conditions were so bad at present he would not be surprised if bombs began to be thrown. He felt that things would be improved once the constitutionality of the Fair Trade Act was decided. He mentioned how the organized demands and threat of substitution forced two manufacturers into adequate enforcement.

Dealer 3. Medium class, independent.

This dealer, as is typical of his class favored price control but complained that about half of the manufacturers who issued contracts were doing it merely as a gesture and were not making a serious effort at enforcement. He laid chief blame upon the fact that manufacturers and distributors were "playing into the hands of business racketeers" by giving excessive discounts in order to get volume.

Dealer 4. Medium class, independent.

This dealer was "thoroughly disgusted" with the state of business, but didn't see what could be done to change conditions. He stated that contract prices usually mean nothing; e.g., a certain product with a minimum resale price of $1.08 can be purchased anywhere for $.84. (It was advertised at this figure by one of the chains on January 6, 1935.)

Dealer 5. Lower class, small independent.

This dealer had turned his drug store largely into a liquor establishment because he stated the controlled advertised brands of liquor gave 25 per cent and the unadvertised brands 33-1/3 per cent at least. In his drug business, he sells substitutes at a larger margin whenever possible.

Dealer 6. Medium class, independent.

This dealer was thoroughly pessimistic and had gotten to the point where he refused to sign Fair Trade contracts because there was no follow-up on them anyway. The interviewer was given a copy of a contract received from a large soap company six months ago which had not been returned to the company; yet they received merchandise as usual. Several instances were given of purchases made from cut-rate competitors at prices below their own wholesale cost.

Dealer 7. Independent, "pine board".

This dealer stated that he was selling below the contractual prices in a number of instances and nothing was being done about it. He stated that in his location he would be forced to close his doors immediately if he maintained prices.

Dealer 8. Independent, "pine board".

This dealer was very outspoken and stated that his problem in his location was to "meet all competition." If he would maintain prices his competitors would cut and he would soon be out of business. For instance, he has found that whenever he has agreed to maintain prices, his next door competitor would cut below him. He stated that most manufacturers can be "chiseled down on their prices," -- that he gets secret rebates and discounts, free goods and even cash for placing orders. For instance, he was offered a product at $1.20 a dozen and when he refused stating he must buy it to sell at 7¢ each, he was able to buy it at 6¢ by placing a small order for other merchandise. On nationally advertised goods he was meeting all prices even though his margin was 5 per cent or less on these items. On unknown merchandise he was able to do much better; e.g. he was selling an unknown hair dressing at 17¢ which had cost him 6¢. At times he would purchase a dozen items of a well-known product and advertise it well below cost - losing, say, $2.00 on the merchandise, but obtaining "about $500.00 worth of advertising." Refusal to sell on the part of manufacturers did not disturb him; he was always able to pick up the merchandise somewhere.

Dealer 9. Medium to lower class, independent.

This dealer was unusual for his class because he opposed price control because it would lead to an influx of new dealers, and everyone would be as badly off as now. This dealer makes up much of his merchandise himself and substitutes it for nationally advertised goods.

Dealer 10. Independent, "pine board".

This dealer opposes price control along with nationally advertised brands. His business is built primarily on substitutes for well-known brands. For instance, instead of a low-margin, nationally advertised dentifrice, he sells an unknown one for 23¢ which costs him 12¢.

Dealer 11. "Pine board" with a small number of stores.

This dealer stated that every legitimate operator should be free

to do as he pleases. He claimed that he gave his customers whatever they wished; if they wanted nationally advertised goods he would sell these to them at controlled prices. The latter portion of this statement obviously was erroneous; so the interviewer made the following collection of prices in two of his stores in relation to the going stop prices:

	Stop Price	Selling Price
Product 1	.23	.17
Product 2	.87	.79
Product 3	.67	.59
Product 4	.98	.79
Product 5	1.50	1.39
Product 6	1.25	.98
Product 7	.98	.89
Product 8	.98	.89
Product 9	4.00	3.69
Product 10	.79	.69
Product 11	.05 straight	.6 for .25
Product 12	.98	.89
Product 13	2.75	2.69
Product 14	.35	.34

As far as the interviewer could discover, very few suppliers were making any attempt to force the firm into line. One well-known drug manufacturer stated that it had refused to sell but that its products were obtained through unknown channels. In other instances, the dealer claimed that the prices were an error and that he would correct them, but the "errors" continued indefinitely. In one instance, a manufacturer was told that as soon as the window was changed the error would be corrected; but the window remained the same for weeks.

Dealer 12. "Pine board" with small number of stores.

This firm aims definitely to substitute for national brands. Well-known brands are placed on low shelves back of the counter; substitute brands with wider margins are given the prominent positions. Tobaccos, particularly, were being used as loss leaders.

Beyond the summaries and individual statements listed above there remain only the older and larger chain systems and department stores. It is significant that these chains now publicly take a position favorable to resale price maintenance. The attitude of department stores in California appears to vary with the type of store; the upper and medium class stores stating that they have no particular opposition to price control in their drug departments; the stores with a lower class clientele object strenuously to control. However, to the best of the writer's knowledge, no department store is an active proponent; the general attitude is more nearly one of indifference.

In summary, it may be stated that the active proponents of resale price maintenance in the retail trade are the great numbers of smaller independent dealers, particularly those in neighborhood locations and

middle and upper class clientèles shotted somewhat by the older and larger chain stores and department stores; in active opposition are those dealing usually with lower class clienteles selling merchandise with limited service on the basis of a price appeal. Since neither markets nor merchandising practices remain segregated or pure, it is clear that out of this alignment there was bound to arise a serious clash of interests in the business of retailing drugs and drug products.

B. Manufacturers and Wholesalers

This field is too complicated and diverse to allow a thorough-going, representative survey of the attitudes and experiences of the various groups in the trade. However, it is possible from the materials collected by the writer to illuminate the problem in a three-fold fashion: (1) by brief summaries of interviews, (2) by statements from particular firms whose experience is especially significant, (3) by reference to published statements and advertisements.

In the fall of 1937, fifty small and medium sized manufacturers of products sold through drug stores were interviewed in the San Francisco bay region. Of these fifty smaller operators, forty expressed themselves as favorably disposed to resale price maintenance; yet the general attitude was one of apathy. Thirty-five firms felt that they were injured by price cutting in the retail trade; the balance stated either that it made no difference or that it benefited them. All of the forty which were favorable to price maintenance stated that they suggested resale prices; only half of them made any attempt at control. From the fragmentary results of this particular interviewer's field work, it appears that small manufacturers are neither especially interested nor, practically speaking, sufficiently involved in the problem to take a positive position.

Much more positive was the reaction obtained from interviews with firms selected either because of prominence or the fact that they had had definite experience with price control. In January and July, 1935, twenty-nine firms were interviewed in Los Angeles; three of the group were wholesalers, the balance being manufacturers or their sales representatives in California. Eighteen of the twenty-six manufacturers expressed themselves as being favorable toward resale price control; sixteen of the eighteen spoke also for the California Fair Trade Law. Fourteen of these same group of sixteen were at the time employing Fair Trade contracts; the other two were planning to use them in the near future. Proceeding enough, it was this same group that stated that price cutting in the retail trade injured them; five of the balance said it benefited them, and the others said it was a matter of indifference. Only four of the twenty-six manufacturers did not suggest resale prices. Sixteen of the group were making efforts at enforcement. Of the eighteen firms that had experience attempting to enforce resale prices (two of these had dropped their attempts at the time of the investigation); nine stated that prices could be enforced effectively; five felt that enforcement could be only moderately successful; four were dubious about the whole matter. All of them contended that effective enforcement required cooperation with the other members of the trade. Only ten expressed themselves in a positive fashion that dealers showed

appreciation of efforts to stabilize prices.

Of the three wholesalers interviewed, two were in favor of price control, the third refused to venture an opinion. All of them stated that enforcement was the manufacturers' problem; although two were cooperating by refusing deliveries if manufacturers so directed them.

Equally as much meaning can be distilled from the detailed statements of a number of selected firms.

Firm 1. A very prominent eastern manufacturer of highest reputation.

This firm has issued contracts and thoroughly endorses price control. It was having a great deal of difficulty enforcing its system. For instance, it had refused sales for two years to two local price-cutting chains, but both were obtaining supplies through eastern channels. In another instance, they have coded their merchandise and have been making purchases from the cutter but have as yet been unable to trace the source of supplies. This firm feels that it is impossible completely to cut off supplies from aggressive cutters.

Firm 2. Well-known eastern firm of excellent reputation.

The position of this firm was exactly similar to that of Firm 1 (above) even to the difficulty of policing its plan.

Firm 3. One of the largest houses in the country.

This firm has a national stabilization plan which involves shipping on consignment to wholesalers. It feels that its plan is working satisfactorily.

Firm 4. Large eastern manufacturer.

Ninety-seven per cent of contracts were signed and returned. In cases of violation this company buys up the stocks and then refuses sales. The manager stated that it was too expensive to do a complete job of enforcing, especially because most retailers "were price cutters at heart." As an example of the difficulties of policing the manager told of one Los Angeles firm which they had cut off, but which obtained supplies by arranging a trade with a South Carolina wholesale house through a traveling dealer.

Firm 5. The California representative of an eastern house.

This firm has been very aggressive in enforcing its prices and stated that it thought its plan was 100 per cent effective. When the interviewer told the manager of two violations that he had noticed the reply was that when the constitutionality of the amendment was settled they would take further legal action.

Firm 6. A large national concern.

This firm has been a leader in price maintenance. Without doubt

it has been doing the best job of enforcement in the state. California sales have increased 700 per cent, it was stated, because of the appreciation of dealers. However, the company has in addition been doing a tremendous amount of advertising and sales promotional work.

Firm 7 A small, national specialty manufacturer.

This firm has issued contracts largely to pacify the trade but has made practically no effort at enforcement.

Firm 8. A national specialty manufacturer.

At the time of the interview this firm was considerably "soured" on price maintenance, especially because it felt it was paying too much for results obtained. It was having great difficulty in enforcing its plan. It is interesting that since this interview the company has become more aggressive and has taken court action in a number of cases.

Firm 9. A national manufacturer of a specialty product.

This firm claims to have been the third to issue contracts in the state. Its experience has made it definitely opposed to price maintenance. Previous to its attempt at control its product which is marked to retail at 50¢ was generally sold for 29¢ in cut-rate stores; exclusive stores tried to get the full price. At this time the wholesale price was $4.00 a dozen with one package free with each dozen. When the firm issued contracts it cut the wholesale price from $4.00 to $3.20 a dozen and eliminated the free package. It set a minimum resale price of 39¢. The company experienced the following difficulties: (1) the trade continued to insist upon the free package; (2) dealers resisted signing the contracts; (3) it was impossible to control the cut-price chains; (4) there was a heavy decline in sales.

Firm 10. A large national firm.

For a time this company was not using contracts in California; it shortly began to do so. It was attempting to stablize prices by refusal to sell. The firm was having a great deal of difficulty in whipping the trade into line. One dealer particularly was highly successful in obtaining supplies indirectly. The firm was annoyed because it was receiving telephone calls at all hours of the day and night from retailers who were complaining about price-cutting on its products.

Detailed accounts of other interviews might be reproduced. In addition, reference may be made to published statements and advertisements in The Northern California Drug News. The list below is not exhaustive; it aims merely to reflect the public attitudes of a number of firms:

1. Scientific Laboratories of America, Inc.

"With the persistent effort and support of all the manufacturers ...we will be able to win our battle against predatory price cutting." (January 1, 1934, p.5)

2. Sharp & Dohme.

"Fair profits, stabilization of industry, and elimination of ruinous price cutting is a worthy cause to rally to." (January 1, 1934, p.5)

3. D. Weeks & Company.

"The California Fair Trade Act is one of the fairest pieces of legislation ever enacted." (January 1, 1934, p. 5)

4. Gillette Safety Razor Co., Ltd.

"Without reservation and in connection with our national policy we intend cooperating with the California Fair Trade Act." (January 1, 1934, p. 5.)

5. Abbott Laboratories.

"I honestly feel that the business of Abbott Laboratories in Northern California has increased materially through our participation with the California Retail Druggists Association in supporting the California Fair Trade Act." (January 1, 1934, p. 11.)

6. Youngs Rubber Corporation.

"You (i.e. retail association) have it in your power to dictate to every manufacturer in the drug business." (January 1, 1934, p. 11.)

7. Bryant and Cattner.

"The California Fair Trade Act gives the merchant fair play, fair profits and a square deal, destroying the cut-throat chiseler and making personality a large factor in retailing." (January 1, 1934, p. 11.)

8. American Druggists Syndicate

"The California Fair Trade Act embodies exactly the things that we have been preaching for the past thirty years." (January 1, 1934, p. 12.)

9. Dr. Miles California Co.

"The California Fair Trade Act is a boon, both to manufacturers and to retailers ... We cannot but feel that a statute designed to prevent trade demoralization cannot be other than consittutional." (January 1, 1934, p. 13.)

10. Armand Co.

"Our experience has been entirely satisfactory." (January 1, 1934, p. 13.)

11. Northern Warren Sales Company Inc.

"Any manufacturer who has a world-wide organization such as ours

knows the ideal conditions in the trade in a country like England where price stabilization is perfectly legal." (January 1, 1934, p. 13.)

12. Geo. H. Eberhard Co. (Distributor for the American Safety Razor Corporation, American Hard Rubber Co., Ingersoll-Waterbury Co., and Amity Leather Products Co.)

"Our clients are contributing in every way to make the law effective, and are with the retail trade to the limit." (January 1, 1934, p. 14.)

13. Bronchi-Lyotus Laboratory

"The Fair Trade Act .. should be the salvation for the independent druggist." (January 1, 1934, p. 14.)

14. Johnson & Johnson.

"We are operating to the limit, to maintain our established resale prices and we have had very little difficulty in doing so." (January 1, 1934, p. 14.)

15. Castormilk Inc.

"We have joined with you (i.e. retail association) in your fight to stop price cutting and the right to a legitimate profit." (February 20, 1934, p. 8.)

16. Johnson & Johnson.

"At the present time there are 145 dealers whom we do not recognize nor sell because of their violation of our national price protective policy." (Advertisement, April 20, 1934, p. 11.)

17. E. R. Squibb & Sons

"Aggressive price-cutting is to be condemned as destructive of every interest ... We have released a list of certain Squibb products with rational minimum retail prices ... To the wholesale list prices have been added the average cost of selling at retail this class of products as shown by national surveys. ... We hold these minimum retail prices to be fair to the retail druggist and to the consumer. (Advertisement, June 1, 1934, p. 2.)

18. Guy S. Shoemaker (representing Frostilla Co. and Scott & Browne)

A letter to the Northern California Retail Druggists' Association in which Mr. Shoemaker states that he has made a six weeks survey of conditions in the State and on this basis decided to come under the provisions of the Fair Trade Act. (Nov. 15, 1934, p. 7)

19. Bauer & Black

"To date the contractual arrangements that my firm enjoys with

retailers under the California Fair Trade Act have resulted in a wider distribution of the general Bauer & Black line and specialties, with increased emphasis and cooperation on the part of the trade ... which is most gratifying." (Mar. 1, 1935, p. 14.)

It is exceedingly difficult to summarize the opinions, attitudes, and experiences of manufacturers and distributors as indicated in the surveys, individual interviews and published statements presented in the preceding pages. However, the following conclusions force themselves out of the evidence:

1. The experiences and attitudes of manufacturers and distributors were exceedingly diverse.

2. The general attitude was one favorable to resale price control but there were several violent objectors.

3. There was a great amount of indifference and skepticism especially on the part of smaller firms.

4. There was considerable agreement as to the difficulties of enforcement, especially because of ease of access to out of state sources of supply.

5. There was considerable agreement that effective enforcement required broad cooperation in the trade

6. There was a general feeling of instability because of the legal uncertainty.

7. A number of firms were issuing contracts merely as a stage gesture, and without any serious intention of enforcement.

8. There was considerable difference of opinion concerning the amount and quality of cooperation received from dealers after price control went into effect.

Chapter VI. The Pressure from the Organized Retailers.

There can be no doubt that the movement towards resale price control since 1933 derives its vitality and momentum from the demands and methods of the organized retail druggists of the state. The story of the tactics in the retail trade deserves detailed recounting. The strategy of the organized retailers to bring manufacturers into line included the following procedures: (1) educational work, (2) pressure upon firms by individual dealers through contacts with salesmen and by correspondence, (3) gaining the formal cooperation of allied drug trade groups, (4) militant organized refusal of cooperation to manufacturers who made no attempts at control, (5) organized cooperation with manufacturers who sincerely attempted to stabilize the market. This general program was effective in both larger centers and smaller communities, expressing itself through the regular retail associations and the militant so-called "Captain Plan" which ranged beyond the confines of association membership.

After the passage of the 1933 Amendment a Fair Trade committee was set up in the California Pharmaceutical Association to endeavor to encourage manufacturers to operate under the Act.* This committee made personal contacts with manufacturers, educating them concerning the significance of the amendment. In September 1933 the committee sent a form letter and a sample suggested contract and a copy of the law to several hundred leading manufacturers who used drug stores as outlets. This letter was entirely educational in quality and tone,** explaining the act and amendment, and indicating how manufacturers could qualify themselves to operate in California. The final paragraph extended an offer of cooperation as follows:

> "To those manufacturers who show a willingness to assist in our state recovery program toward sanity and stabilization of prices and who will operate under our Fair Trade Act, we can offer a wholesome cooperation and promotion of their merchandise that will result in our mutual welfare."

Concurrently, druggists were making their individual points of view felt. When salesmen dropped in for business, the proprietor would ask them concerning the attitude of their firms toward the Fair Trade Law, and suggest that it would assist orders to issue contracts. Shortly, dealers in their individual contacts became more aggressive and began refusing orders; in some instances even refusing a hearing to the representatives of firms outside the pale. Likewise, dealers frequently wrote letters to manufacturers expressing their opinions in unmistakeable metaphor.

Late in the fall of 1933, the efforts of retail druggists received the organizational support of a larger grouping called the California Fair Trade Federation. The Federation incorporated within itself

---

(*) cf. Warnack, R.S., The California Fair Trade Act, pp. 10-18.

(**) A copy is reproduced in Warnack, op. cit. pp. 12-14.

representation of all the major groups involved in the drug industry except cut-rate institutions (i.e. independent and chain druggists, department stores, wholesalers and manufacturers).* The stated primary purpose of the Federation was "to obtain as quickly as possible a validation of the law by the Supreme Court." It was the Fair Trade Federation which pushed the case of Leco Co. vs. Sunset Cut Rate Drug Co. to its successful conclusion.

In the next place, there was the aggressive, militant action taken by the retail druggists through their associations. The publications of the associations echo a great deal of this spirit, a few examples are given below to illustrate the quality of this organized expression. The action of the retail druggists officially took two general forms: (1) threats of non-cooperation with manufacturers who made no efforts to stabilize prices, (2) specific offers of assistance to those who made sincere efforts to operate under the Fair Trade Act.

The official attitude was expressed on February 10, 1934 as follows: "Don't give any cooperation to manufacturers who are not operating under the Fair Trade Act." ... "Go out of your way to give cooperation to those manufacturers who are under the Act."** The militant feeling of many dealers was expressed in an editorial by the executive secretary under the heading "Can We Be Forced to Buy" on March 1, 1934, as follows:***

> "This question is rapidly forcing itself to the front and is one which should be squarely faced and answered now.
>
> "Can we be forced to buy, is there sufficient pressure anywhere which can compel us to stock certain merchandise and in consequence sell certain merchandise?
>
> "Can the force of advertising overcome the quiet resistance of the retailer who does not desire and who has no intention of selling a product which does not show him a net profit? Will the public continue to seek an article which they fail to find in place after place? Will the cost of advertising rise to the point where it meets the diminishing returns from sales and if this does happen, where will the manufacturer be, who, in his mad chase for volume, neglects to provide for his distributer?
>
> "What good to the manufacturer is the high priced ballyhoo of the expensive advertising agency? What good to him is that descendant of the leather lunged spieler - the radio announcer - if it costs more to get a customer than you can profit by him? You might yelp the virtues of your product to the eager public over a national hook-up or croon to them of the crying need of your wonderful discovery. Where can they get it, Mr. Manufacturer, if your distributors have folded up or if these self-same distributors cease being dupes and refuse to sell your bunk?

(*) cf. The Northern California Drug News, Dec. 30, 1933, pp. 4, 8 & 9.
(**) The Northern California Drug News, February 10, 1934, p. 9.
(***) The Northern California Drug News, March 1, 1934, p. 3.

"Five years ago; two years ago; yes, one year ago, such a situation seemed impossible, but today itis actually here - to be considered seriously, considered by even the greatest patent medicine baron of our time.

"The retailer is becoming organized. He is beginning to know his strength, and above everything, he is learning that he must use this strength in his own behalf if he does not perish.

"This sentence sounds like one of those general expressions which do not mean a thing - like an evasion of the real issue. It is not meant that way, it leads up to this plain and flat declaration which admits of no misunderstanding.

"We refuse to handle your merchandise unless you protect your resale price at a profit level. 'We are offering you in California a legal means of so doing. We are sick and tired of hearing some manufacturers say, 'It costs too much,' 'It is a lot of trouble!. It will cost much less to come in than to stay out, and it will be much less trouble."

Similar appeals appeared in later issues. For instance, on March 1), 1934, (p.5) under the heading "Gold Bricks", the trade was told, "When one of these medicinal and commercial gold bricks shows up on the market, let's throw it in the ash can, even though it might be accompanied by a Fair Trade contract." The sentence has reference to a product with a wholesale price of $4.00 a dozen, and a minimum resale price of 39¢.

On July 17th the Association passed the following resolution:

"Resolved, that this Association urges and advises its members to completely discontinue the sale of the products of any and all companies which cancel Fair Trade contracts." *

The impact of this resolution will be presented below in the discussion of the case of a well-known dentifrice manufacturer.

In addition to the threat of refusal to cooperate with manufacturers who did not meet the demands of retailers there was also a growing attitude that the pharmacists had allowed too much manufacturing to leave their own establishments. A lengthy paper by John Culley expressed this point of view.** Mr. Culley, in this paper, appeals to pharmacists to return to their former professional status. He contends that retail druggists "are tired of acting as a manufacturer's distributor without pay and many times paying for the privilege." He points out that as a

---

(*) Northern California Drug News, Sept. 1, 1935, p. 3.

(**) Northern California Drug News, Dec. 15, 1935, pp. 4-10. This paper was presented to the Northern California Retail Druggists Association November 13, 1935.

result of the increase in trade-marked proprietary products the retail druggist "must increase his investment without any additional output. He is obliged to keep in stock a dozen or more varieties of Trade Mark brands of proprietary remedies having a similar fanciful coined name, all containing the same ingredients, claiming as having the same extravagant medical virtues and all outrageously over-priced, all of which is detrimental to the interests of the Pharmacist, the Physician and to the Public." Then it is argued that if it is ethical for manufacturers to duplicate and imitate each other's products, it is equally so for the pharmacist. The pharmacist is strongly advised to manufacture and introduce many of his own products, thus giving him both a manufacturing and retailing profit. The paper concludes with a number of examples to illustrate the writer's thesis:

"For your information and convenience I will quote a few cost prices on some types of preparations that can be easily and quickly made by the retail pharmacist and quote also the cost price he will have to pay for a similar product from the large manufacturer. It is interesting to note that the New Jersey State Pharmaceutical Association, by means of a standing Professional Committee recognize the facts expressed in this paper and have selected and placed before their members many formulae for remedies that are similar to well known but drastically overpriced proprietary Trade Marked articles. I have attached to this paper several formulae with working directions some of which are those recommended by the N.J.Ph.A. and will be pleased to furnish them to those interested:

Elixir Amidopyrine	Cost to buy	$5.44	1000 cc
	Cost to make	1.25	
Elixir Phenobarbital	Cost to buy the Proprietary	2.50	pint
	Cost to make with the USP chemical	.35	
Syr. Potass. Guaiacol Sulphonate	Cost to buy	3.00	1000 cc
	Cost to make	.80	
Ephedrine Inhalant	Cost to buy	17.00	1000 cc
	Cost to make	.80	
Ephedrine Inhalant Com.	Cost to buy	17.00	1000 cc
	Cost to make	1.35	
Ephedrine Solution 3%	Cost to buy	4.80	pint
	Cost to make	1.25	
Solution Ephedrine and Ephinephrine	Cost to buy	28.00	1000 cc
	Cost to make	3.80	
Capsules Ephedrine Sulph. 3/8 grain each.	Cost to buy	2.12	100
	Cost to make	.34	
Capsules Ephedrine Sulph. 3/4 grain	Cost to buy	3.50	100
	Cost to make	.60	

The following represent just a few of the USP and NF preparations that can be made much cheaper and easier than to buy ready-made:

Brown Mixture	Cost to buy	.55	pint
	Cost to make	.31	
Rhubarb & Soda Mix.	Cost to buy	.55	pint
	Cost to make	.30	pint
Elix. Sodium Bromide	Cost to buy	.70	pint
	Cost to make	.27	pint
Elix. Potass. Brom.	Cost to buy	.80	pint
	Cost to make	.30	pint
Elix Teroin Hydrate	Cost to buy	7.68	gallon
	Cost to make	3.36	
Elix. Terpin Hyd. & Codeine	Cost to buy	8.50	gallon
	Cost to make	5.36	
Elixir Simole	Cost to buy	5.40	gallon
	Cost to make	2.10	gallon
Syrup Hydriodic Acid	Cost to buy	.78	pint
	Cost to make	.18	
Syr. Wild Cherry	Cost to buy or make from Fluidestract.	.45	pint
	Cost to make	.20	
Dobells Solution	Cost to buy	1.25	gallon
	Cost to make	.25	
Calamine Lotion	Cost to buy	1.50	gallon
	Cost to make	.75	
Ointment White Precipitate	Cost to buy	1.25	pound
	Cost to make	.60	
Ointment Sulphur	Cost to buy	.67	pound
	Cost to make	.35	
Fehlings Solution	Cost to buy	1.00	pound
Cooper A	Cost to make	.10	
Alkaline B	Cost to buy	1.00	pound
	Cost to make	.40	
Benedicts Solution	Cost to buy	.60	pint
	Cost to make	.25	

"The average saving by making Tinctures from standard Fluidextracts is from 25% to 33% not taking into consideration the less amount of investment required by stocking 1/4 pound Fluidextracts instead of pints of tinctures, many of which are seldom used.

"Other products that the retail druggist should make rather than buy because they are cheaper and incidentally carry his own name:

Odontalgicum, Toothache Drops.	N.F.
Dentifricium, Tooth Powder	N.F.
Collodium Saliclicum. Corn Cure	N.F.
Nebula Aromaticum. Cold and Catarrh Inhalant	N.F.
Pulv. Antisepticus. Douche Powd.	N.F.
Sodium Perborate Aromatic	N.F. VI.
Mist Chloral & Potas. Brom Bromidia Type	N.F.

"I think with the foregoing examples which are but a sample from many I have given enough comparative costs to prove it is cheaper to make than it is to buy." that

Thus it is seen that the retail druggists were aggressively in a formal organized way through their associations breathing defiance against manufacturers who they felt were getting the chief profits from distribution through drug stores; likewise, that there was arising a conception of entering into competition with manufacturers in order to regain profits, and restore pharmacy to its professional status.

The other side of the picture represents the specific offers of co-operation with friendly manufacturers. At the annual meeting of the Northern California Retail Druggists' Association, November 20, 1934, the following resolution was passed:

"Whereas, many manufacturers now operating under the California Fair Trade Act are making sincere efforts to enforce their contracts, and

"Whereas, the earnestness and sincerity of these efforts are easily demonstrated by the fact that the contract prices of such manufacturers are generally maintained;

"Therefore Be It Resolved, that all druggists of northern California be hereby urged and requested to give full and loyal support to all such manufacturers by merchandising, displaying and recommending their products."*

Beyond the cooperation extended by individual dealers, the Association stated that organized support was given a week each, to various manufacturers. The given week was named for the particular manufacturer and 3,000 window displays were installed at one time throught the state to feature the products of the manufacturer for the week. On August 15, 1935, it was stated that the following manufacturers had received this service: Dr. Miles California Co., Gillette Razor Co., E.R. Squibb & Sons, Agfa-Ansco Corporation, Colgate Palmolive Peet Co., Weco Products Co., Coty Co., Ever-Dry Sales Co., Bayer Co., Scholl Manufacturing Co. It was stated that other weeks were being arranged. "Window displays, inside displays, sales cooperation for Fair Trade Manufacturers is the policy of the California druggists."**

Militant activity was not confined to the larger centers, for small town druggists were also up in arms, refusing patronage, returning inventories to manufacturers and in general sharing in the movement.***

(*) Northern California Drug News, December 1, 1934, p. 12.

(**) The Northern California Drug News, August 15, 1935, p. 6.

(***) For a typical expression of opinion on the part of small town dealers see the Northern California Drug News, December 1, 1934, p. 5.

The organizational core of the retailers' militant program was the now famous so-called "Captain Plan" which has since spread to other parts of the country. There has been much discussion of the origin of the Plan; as far as California is concerned it seems definitely settled that its progenitor was an Oakland, California druggist. The essence of the Captain Plan merely was the detailed, organization of each district so that there was an effective quick means of gaining cooperation among druggists, whether members or non-members of the Association. A small group of dealers was assigned to a Captain whose duty it was to get them, insofar as possible, to operate as a unit. Through meetings, called usually at night after store hours so all might attend, personal discussions and informal contacts the druggists developed, often, a collective attitude, policy and procedure. Under the Plan there was both the constructive attitude of cooperation with friendly manufacturers as well as the negative one of opposition to those who did not meet the demands of the dealers. There can be little reason to doubt that the Plan was an effective element in the whole movement for resale price control. It appears, however, that it was much more influential near its birthplace in Northern California than in the Los Angeles area.*

The amount of strength that was demonstrated by retail druggists through the organizational devices discussed in the preceding pages may best be illustrated by two very famous cases. The first example is that of a well-known aspirin manufacturer. This firm was requested, by a petition of signatures twenty feet in length early in August, 1934 to operate under the Act. When the petition did not seem to receive the reception that the dealers expected, the published statements in the Northern California Drug News became increasingly antagonistic in tone. It was made clear in these statements that the dealers had the power of substitution even in this case. The slogan was "No Fair Trade Act - No Orders." The most terse statement of attitude was the following:

> "This Aspirin is a sort of Napoleon in the patent medicine army, but then, even the great Frenchman met his Waterloo when the rest of Europe got together, decided that they had enough of him and cooperated against him."**

The outcome of the controversy was that the company issued Fair Trade contracts early in 1935.

The second case was publicised nationally and had repercussions throughout the entire country. It is peculiarly well adapted to reflect the state of mind of retail druggists throughout the nation as well as in California. In the January 1, 1935 issue of the Northern

---

(*) For greater detail see Warnack, R.S. op.cit., pp.17 & 18 and issues of the Northern California Drug News throughout the period. In addition to these published materials the writer has in his files, opinions of a number of dealers, especially in Los Angeles.

(**) The Northern California Drug News, September 20, 1934, p.3. See also the issues of August 20, 1935, p.5; September 1, 1934, p 8; September 10, 1934, p.3; December 15, 1934, p.6; April 15, 1935, p.5.

California Drug News there is an editorial lauding a well-known national dentrifice and antiseptic manufacturer for finally issuing Fair Trade contracts after months of request, including a formal petition, on the part of retailers. The company was praised particularly because it guaranteed minimum margins of 18.4 percent, 26.5 percent and 34.2 percent depending upon the quantity purchased. However, on July 13, 1935, dealers in California received letters from this firm advising them that it was necessary to withdraw from operation under the Fair Trade Act since they were making shipments directly from Chicago and hence were involved in inter-state commerce. Immediately, a storm broke loose in California which swept into other states before it had spent itself. On July 17 the Northern Association passed a resolution condemning the company and urging and advising its members to "discontinue the sale of the products of any and all companies which cancel Fair Trade contracts." Similar action was taken in the southern association. The response of the trade was amazing for an almost universal boycott was raised against the firm. For a period it was possible to obtain the products of the firm, primarily only from a few cut-rate outlets. An interesting aspect of the situation was that a number of large wholesale houses also cooperated by refusing to deliver the items of the company. It appears that the company had a startling decline in sales in California. Worse still, the antagonism spread into other states and affected sales and attitudes nationally. The outcome was that the company capitulated completely again issuing contracts in California; and likewise, so it is stated, giving a check of $25,000 to the National Association of Retail Druggists to be used in its fight for price maintenance legislation.

Chapter VII. Enforcement

I. The Procedure of Enforcement

It is essential to give a brief, separate review of the enforcement of resale prices even though there have been many references to this in the preceding pages. Once a manufacturer or distributor has concluded that he wishes to operate under the protection of the Fair Trade Law, the first step is the issuance of contracts. Literally, it appears from the wording of the 1933 Amendment - one signed contract might be the basis for action. The customary procedure is to obtain a relatively complete coverage of the trade. Warnack, in his review of the California Fair Trade Act, of April, 1935 enumerates four types of contracts:

1. Manufacturer - retailer contracts.

2. Wholesaler - retailer contracts.

3. Broker - retailer contracts.

4. The omnibus contract.

Warnack concludes that the latter two contracts are of questionable legality, and strongly advises the direct manufacturer - retailer contracts. For the time being the matter of details of legality must be held in abeyance until the legal status of Amendment 1-1/2 is settled; only then may minor related legal details be thoroughly established.

A great many contracts have been issued in the state with considerable variation between them. Slightly more than three hundred manufacturers and distributors were named on the official Fair Trade List of the Northern California Druggists Association at the end of 1935. Rather than attempt to work through the details of a large number of individual contracts it will be adquate for the purpose of this review to reproduce the contract forms recommended by the Northern California Retail Druggists Association for (1) the general type of contract between a producer or distributor and retailer; (2) the "omnibus" contract* for general wholesale purposes.

GENERAL TYPE OF CONTRACT

CONTRACT BETWEEN THE _____COMPANY AND
RETAILER UNDER THE CALIFORNIA FAIR TRADE ACT
THIS AGREEMENT entered into as of this___day of____
193_, by and between the _____Company, a California
corporation with offices at _____,(hereinafter called
"Distributor"), and _____, of_____
California (hereinafter called "Retailer").

(*) Taken from the Northern California Drug News, August 15, 1935.

WITNESSETH:

Whereas, Distributor is engaged in the sale and distribution of commodities of standard quality which bear, or the label or content of which bear, the trademark, brand or name of the producer or owner of said commodities, particularly including

_____; and

Whereas, Retailer is engaged in retail business in the State of California, and sells said commodities to consumers thereof; and

Whereas, Distributor and Retailer mutually desire to avail themselves and the public of the provisions and protection of the "Fair Trade Act" of California as enacted in 1931 and enlarged in 1933;

NOW, THEREFORE, in consideration of the premises, the promises herein contained, and for other considerations, the parties hereto hereby agree as follows:

1. Retailer will not, within the State of California, advertise, offer for sale, sell or resell any of said commodities except to bona fide consumers nor at prices less than the following:

(INSERT MINIMUM PRICE SCHEDULE)

Distributor reserves the right to change said price schedule at any time by notifying Retailer thereof and Retailer agrees that all such changes upon being made, shall become the prices stipulated in this contract.

2. Distributor agrees that so long as Retailer faithfully observes all the terms of this agreement and maintains a credit standing satisfactory to Distributor, Distributor will sell (or cause authorized persons to sell) said commodities to Retailer at the current standard retailers' discounts, established by Distributor.

3. Retailer agrees neither to give away any article of value, nor to make any concession in connection with the sale of said commodities.

4. This agreement may be cancelled on _____ days written notice given by either party hereto to the other.

5. In the event, (a) of closing out Retailer's stock for the purpose of discontinuing delivery of any of said commodities, or (b) that said commodities in Retailer's hands are damaged or deteriorated in quality, or (c) that Retailer has on hand any of said commodities after this has been terminated in accordance with the provisions of Paragraph 4 (or for any other reason), Retailer shall, before offering any of said commodities for sale at prices less than the minimum retail prices stipulated by Distributor, first offer in writing to sell such commodities to Distributor at the prices at which Distributor is then selling such commodities to retailers generally in the State of California, and such offer shall remain open for ten days after receipt by Distributor.

6. Retailer shall pay Distributor, as liquidated damages for each and every sale at less than the minimum price herein stipulated and for each and every other violation of this agreement by Retailer, the sum of $_____, it being otherwise impossible to fix the measure of damages. Wherever Distributor shall institute, and prevail in, any proceedings or action in any court against Retailer in connection with this agreement, Retailer agrees to pay Distributor a reasonable attorney's fee.

7. Both parties agree that this contract shall be effective within the State of California, and not elsewhere.

IN WITNESS WHEREOF, the parties hereto have executed this agreement, in duplicate, as of the day and year first above written.

_____
Distributor

_____
Retailer

"OMNIBUS CONTRACT"

JOHN DOE & COMPANY

RETAIL SALES CONTRACT

FOR MERCHANDISE BEARING THE TRADE-MARK, BRAND OR NAME OF THE PRODUCER OR OWNER AND DISTRIBUTED BY JOHN DOE & CO. INCORPORATED, IN CONFORMITY WITH THE FAIR TRADE ACT OF THE STATE OF CALIFORNIA AND OPERATIVE ON TRANSACTIONS WITHIN THE STATE OF CALIFORNIA ONLY.

THIS AGREEMENT made and entered into this _____ day of _____, 193_, by and between John Doe & Co., Incorporated, a corporation, hereinafter called the Wholesaler, and _____

(Write exact individual or firm or corporate name)

of _____, _____, California.
(Street Address) (City)

hereinafter called the Retailer.

W I T N E S S E T H :

Whereas, (a) Wholesaler is engaged in the distribution to retailers in California of various commodities of standard quality which bear the trade-marks, brands or names of their producers or owners; (b) said commodities are in fair and open competition with other commodities of the same general class produced by others; (c) Wholesaler maintains stocks of said commodities within the State of California for sale and distribution therein; and (d) Retailer is engaged in the retail sale and distribution of such commodities within the State of California; and

Whereas, Wholesaler and Retailer mutually desire to avail them-

selves and the public of the provisions and protection of the Fair Trade Act of California as enacted in 1931 and enlarged in 1933,

NOW, THEREFORE, in consideration of the premises, the mutual promises herein contained, and for other consideration, the parties hereto hereby agree as follows:

1. Whenever the term "commodity" or the term "commodities" is used in this agreement, the same shall be construed to mean any subject of commerce which bears the trade-mark, brand or name of the producer or owner thereof and which is in fair and open competition with commodities of the same general class produced by others, including, without limiting the generality of the foregoing, all commodities bearing trade-marks, brands or names of Wholesaler.

2. Retailer will not, within the State of California, advertise, offer for sale, sell or resell any commodities which bear, or the labels or containers of which bear, the trade-marks, brands or names of their respective producers or owners at prices less than those set forth in retail price lists which have been, or hereafter may be, furnished to Retailer by Wholesaler. All such price lists shall expressly and plainly indicate that the commodities and prices listed are within the terms of this contract.

3. Wholesaler reserves the right to change any and all such price lists at any time (and from time to time) and Wholesaler will make reasonable efforts to notify Retailer promptly of changes. All changes in such price lists shall, immediately upon being made, constitute, the minimum retail prices, referred to in Paragraph 2. Wholesaler's latest price lists are (and all changes thereof, as and when made, will be) available to Retailer at all of Wholesaler's offices. Retailer's ignorance of retail price changes shall not excuse Retailer from any breach of this agreement.

4. Retailer will not sell said commodities, or any of them, to any persons except bona fida retail consumers, nor will Retailer assist any third person, firm or corporation in obtaining any of said commodities for purposes of resale.

5. The giving by Retailer of any article of value in connection with the sale of any of said commodities or the making of any concession in connection with the sale of any of said commodities, without the prior written authorization of Wholesaler, shall constitute a breach of this agreement with exactly the same effect as if Retailer violated the provisions of Paragraph 2 hereof.

6. In the event: (a) of closing out retailer's stock for the purpose of discontinuing delivery of any of said commodities or (b) that said commodities in Retailer's hands are damaged or deteriorated in quality, Retailer shall, before offering any of said commodities for sale at prices less than the said minimum retail prices, first offer to sell such commodities to Wholesaler at the prices at which Wholesaler is then selling such commodities to retailers generally in the State of California. In any event, in the case of Retailer's sale of any of said commodities which are being closed out or are

damaged or deteriorated in quality, Retailer shall give explicit notice to all purchasers that such is the case, and such notice shall be part of all advertising and counter-displays referring to such sales.

7. The parties hereto recognize and agree that it is impossible to determine the actual damage which will result to Wholesaler from sales made by Retailer in contravention of the terms of this agreement and they therefore agree that Retailer shall pay to Wholesaler, as liquidated damages, the sum of Twenty-five Dollars ($25) for each sale made by Retailer in violation of any provisions of this agreement. If, and as often as, Wholesaler shall institute any proceeding or action in any Court against Retailer for any breach of this agreement, Retailer agrees, in addition to all court costs, to pay Wholesaler a reasonable attorney's fee. It is further agreed that, in addition to other legal rights and remedies, Wholesaler shall be entitled to injunctive relief against any and all actual or threatened breaches of this agreement.

8. Both parties agree that this contract applies only to transactions within the territorial boundaries of the State of California. However, both parties further agree that neither shall attempt to do indirectly, or by means of any subterfuge, anything contrary to the letter and spirit of this contract.

9. It is the agreement and intention of the parties hereto that, if any provision or part of this agreement shall be held invalid, the remainder of this agreement shall nevertheless be deemed valid and binding upon the parties. No changes in this printed form of contract shall be binding.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above mentioned.

THE CALIFORNIA FAIR TRADE ACT
MODEL CONTRACT

In view of the discussion in the earlier sections of this report where the law was examined and a number of cases reviewed, it is not necessary at this point to examine these contracts in detail. With respect to the general type of contract it should perhaps be noted:

(1) That the dealer agrees not to give away the product nor to make miscellaneous hidden concessions as well as to hold the minimum prices.

(2) That the dealer agrees to offer to re-sell the products to the supplier in case of closing out the stock or in case of damaged goods before offering them for sale in the market below the minimum prices.

(3) Liquidated damages are definitely stated in the contract.

The omnibus form of contract is one employed by a wholesaler to cover the products of manufacturers. The form used by one large house is so drawn as to include its own branded items as well. Beyond the provisions of the general contract, provision four should be noted,

under which the retailer agrees that he will not sell the commodities to other except bona fide retail consumers, nor assist any third person to obtain the commodities for purposes of resale.

For the purpose of this section it is adequate merely to note that the detailed provisions of the contracts provide the basis for the type of court action which was noted in the earlier legal discussion. That is, the ultimate test of enforcement lies with constitutionality of the 1931 act and its 1933 amendment, and the vigor with which manufacturers and distributors exert themselves, legally. Although the legal remedies are ultimate determinants, they are slow, cumbersome and expensive. Inevitably, a system of enforcement must rely upon recourse to courts only in exceptional instances to determine legal rights or to impress the trade with the serious determination of the vendor. It is significant that in Great Britain there is a minimum of recourse to the courts; the trade prefers its own direct remedies.

However, enforcement by direct action in the trade is complicated not only by the legal uncertainty with respect to the existing law but by the impossibility of close, formal, public cooperation in enforcement. The burden of enforcement is thrown upon individual manufacturers, distributors and wholesalers and cannot be placed upon a formal central body representing all of these interests. Hence, direct enforcement is inevitably costly and difficult. It was these difficulties in Great Britain that led to the foundation of the proprietary Articles Trade Association which represents all the classes of the trade. In the absence of the possibility of group enforcement individual supplies must rely upon:

(1) General Educational work
(2) Refusal to sell
(3) Consignment selling
(4) The application of legal remedies

The essence of the entire problem of the supplier finally becomes one of his willingness and ability to cut off supplies to violators. Obtaining evidence of violations and receiving complaints are not difficult for competitors of offenders and the officers of retail associations actively and voluntarily assist on this end. The real difficulty arises out of the personal and written contacts necessary for the educational and persuasive aspects of enforcement, and the policing, sleuthing, coding, marking, and the like, essential to the withholding of supplies.

II. The Effectiveness of Enforcement

The relative difficulties of enforcement vary widely between firms depending upon the number of dealers, the degree of selective selling, whether the manufacturer has personal, direct, frequent selling contacts, the relative dependence upon cut-rate institutions, the desirability of given items for loss-leader purposes, the age, reputation and degree of monopoly power exerted by the vendor, and many other miscellaneous factors. Enforcement within one state alone is seriously complicated by the relative ease of access to supplies outside the State; hence, the relative stability of a given supplier's national

situation is an extremely consequential factor. It is not surprising therefore that both the willingness of manufacturers to attempt enforcement as well as the relative effectiveness of the endeavor should be highly variable. As long as enforcement must remain an individual matter there seems to be no way of equalizing its burden nor of reducing its expense.

The drug trade is sufficiently simple and small in numbers to make enforcement largely effective if manufacturers eventually decide it worth the effort. In this respect it differs vitally from the grocery trade discussed above. The druggists are particularly fortunate because drug products may not be sold in other than drug stores; thus the problem of inter-outlet competition is not present except in the case of department stores.* The prime difficulty arises out of the fact that so many proprietary drug products make ideal loss leaders.

Throughout the pages of this study of the drug trade there have been numerous references to the actual effectiveness of the enforcement. To date, it cannot be said that minimum and fixed resale prices have been entirely enforced throughout the state. It appears that on the whole, enforcement has been better in the central and northern portions of the state than in the southern. In the San Francisco area it has been claimed that enforcement is 95 per cent effective. Just what this statement signifies is not clear. Its demonstration on any basis would be impossible considering the numerous expedients of hidden price cutting. All the evidence leads to the conclusion that there was in 1934, and continued through 1935, much laxity of enforcement. In the early period, there was much dissimulation and a decided unwillingness to go to the expense and trouble of vigorous control in so far as mild methods pacified the trade. In the later period, many firms were in leash waiting for the settlement of the constitutionality of the 1933 amendment. This does not imply that there was no enforcement, or that the trade was completely demoralized. Contrasted with the first six months of 1933 the 1935 state of affairs at least approached stabilization. The point is that the general scheme to date has not as yet become a smoothly operative mechanism; nor even sufficiently so, to allow the leaders in the movement to relax their efforts. The final result will be seen only when the legal haze is removed. It seems fair to assume that as far as the drug trade is concerned, the resistances to enforcement are not insuperable, at least for a period.

(*) Without doubt, other classes of dealers would enjoy legislation prohibiting druggists from entering their fields.

CHAPTER VIII - THE EFFECTS UPON PRICES AND MARGINS

Although the first provision of Section 1 of the Fair Trade Act states "that the buyer will not resell such commodity except at the price stipulated by the vendor," the majority of contracts stipulate minimum resale prices, not fixed prices. Perhaps, this usage is related to the wording of the 1933 Amendment which reads "at less than the price stipulated in any contract." However, a small proportion of contracts do establish fixed prices.

From the standpoint of the trade, as well as of the public, the impact of resale price maintenance upon the prices paid by consumers and upon dealer margins represents an ultimate criterion of evaluation. The effects upon dealer margins is intimately linked with the general impact upon consumer prices, because these margins constitute such a large proportion of the prices paid by the final buyers.

The price problem, in so far as evidence is available to date, may be stated in the form of the following questions:

1. What are effects of resale price maintenance upon prices in the various classes of institutions in the trade?

2. What are the effects of resale price maintenance upon prices in various areas within the state, particularly the metropolitan, suburban, and rural markets?

3. What are the effects upon prices in California compared with markets outside the state where the identical items are sold?

In Section 3 where trade conditions in 1933 were discussed Tables 1, 2, and 3 and the other evidence given throws considerable light upon the question of the effects of resale price maintenance upon prices in the institutions of a cut-rate character serving the limited service, metropolitan market. Table 1 discloses that in 1933 a prominent San Francisco down-town price cutter was offering to sell 106 drug products at prices which averaged 11.9 per cent below the regular, published wholesale list. Table 2, derived from a computation of advertised prices in the San Francisco Examiner during the first six months of 1933, discloses that these advertised prices averaged 75.75 per cent of 1934 Fair Trade prices. Since only the larger, down-town institutions and chain stores were able to employ newspaper advertising during this period, this figure represents essentially the price offers of price-cutting institutions.*

Table 3 represents a similar study for Stockton, California; in this case the advertised prices were slightly higher, 79.48 per cent of the 1934 contractual prices contrasted with 75.75 per cent in San Francisco. The meaning of these studies is clear. Resale price maintenance, if effectively enforced, leads to a significant increase in

(*) Beginning in 1934, there appeared group advertisements of independent dealers featuring items at code and Fair Trade minima, in an effort to educate the public to the fact that these items could be purchased at lowest prices at these stores.

prices on those contractual items advertised for sale by metropolitan price-cutting and chain outlets. In the specific San Francisco instance, the particular items in Table 2 would be raised from the level of 75.75 per cent to 100 per cent or approximately 25 per cent, figures on contractual prices (33-1/3 per cent in relation to the advertised prices). Presumably, if the Stockton study is indicative, this increase should become increasingly smaller as one moves away from the large metropolitan centers. It is likely that the differential would largely disappear in rural centers. However, this evidence is inconclusive on three scores: (1) it tells us nothing about prices on items not advertised in newspapers, especially non-standard and privately branded merchandise; (2) there is no way of knowing the extent to which some of these advertised prices were "bait", i.e., offers to sell without adequate stocks to supply buyer's demands; (3) they represent the price offers for these items merely of the down-town, larger firms and not of the great numbers of small, independent, neighborhood and urban and rural druggists. There is a little evidence on the first two problems; some data are available on the third question.

In January, 1935, twenty independent retail druggists in the San Francisco Bay region were presented with a list of one hundred drug products selected from the Fair Trade list. These druggists were asked to state their present selling prices for these items and also their selling prices immediately before these items went under contract. Because of the fact that quotations in a small number of instances were given for two sizes, the final list comprised 105 quotations. The aggregate average of the present (i.e., January 1935) selling prices were 105 per cent of the contractual minimum prices. The aggregate average of the former prices to the contractual prices was 114.6 per cent. That is, the going prices in these stores were approximately five per cent above the contractual minimum, and the prices prior to the issuance of contracts were almost 15 per cent above the contractual minimum, and most startling, the going prices had fallen about nine per cent following the introduction of contractual controls. If this very small sample may be taken as representative, then the following conclusions seem proper: (1) independent druggists in the main preferred to hold their prices rather than to fully meet cut-rate competition; (2) the introduction of contractual minima tended to make for a lowering of prices on these items in independent, small drug stores. This result, if correct, seems entirely capable of explanation. Previous to the issuance of contracts the smaller dealers were unwilling to grapple closely with down-town cutters by reducing prices to their level because they knew there was no bottom to the market as far as they were concerned. Their preference, apparently, was to hold prices as high as possible, thus of course, losing some volume to their price-cutting competitors. Once the fair trade contracts fixed the limit to price cutting, then these smaller operators were willing to demonstrate that they were selling as cheaply as any one in the market. In fact, as pointed out above, numbers of them entered group advertising campaigns to educate the market along this line. Thus, Fair Trade contractual prices appear to have a lode-stone effect upon prices in the smaller independent stores pulling them down toward the contractual minimum. Judging from British experience, the minimum contractual prices will eventually become the going prices. Interestingly enough, this conclusion concerning the effect of contractual prices is similar to the unexpected result of the loss limitation provision during the

period of the drug code. It was anticipated by the members of the trade that the prohibition of sales below wholesale price would tend to raise prices. Actually, it appears to have reduced the range of variation and to have pulled the general level down slightly.*

Finally, there is the comparison on contractual prices within California with prices on identical items outside the state. Table 4 shows the results of a study of prices on identical products in department stores in Portland, Oregon and Tacoma, Washington, in relation to California contractual prices. These prices were obtained through the head office of this firm in Oakland, California through which the Portland and Tacoma invoices were cleared. Since Fair Trade Laws patterned after the California statute were not passed in Oregon ** and Washington until 1935, this study represents a comparison of California contractual prices with non-contractual prices of the Pacific Coast. The Portland prices averaged 101.3 per cent of California contractual prices; i.e., they were 1.3 per cent higher. The prices of the 203 items in Tacoma averaged 108.4 per cent of the California contractual prices; i.e., they were 8.4 per cent higher. The range of variation within each group of products also is given in the table; in many instances there was a marked divergence between the low and high prices. Two conclusions seem proper to this comparison: (1) that the general average in Portland and Tacoma was so close to the California contractual prices to lead to the conclusion that the issuance of contracts had not influenced this general average in a significant fashion; (2) that particular prices were decidedly changed by the issuance of contracts, judging from the range of variation in the two northern cities. The likelihood is that the variation in prices in the same commodity class in Portland and Tacoma is traceable to local competitive factors which were not operative in the case of contractual prices.

Table 5 portrays the results of a study of the prices of fifty drug products in twenty Boston stores in comparison with California contractual prices. Manufacturers' suggested prices, the Boston mode and the Boston arithmetic average, and the range of variation are all shown in percentage of California contractual prices. The arithmetic average of Boston prices was 108.4 per cent of California prices; i.e., Boston prices were 8.4 per cent higher. Interestingly enough from a statistical standpoint the general model average was identical although individual model averages varied considerably from the arithmetic mean. Manufacturers' suggested prices in Boston were 19.8 per cent higher than the contractual prices; the range was from the same price as the contractual, to 53.3 per cent higher. This Boston study points to conclusions similar to those drawn from the Portland and Tacoma studies, for the difference in general average is not marked, but there are wide variations with respect to particular items.

Finally, an attempt was made to make a comparison with prices in Canada.*** However, the sample contained only 43 identical items and hence is not large enough for anything except illustrative use. Inter-

(*) See Part II, Chapter VII

(**) Oregon's 1935 statute repealed an earlier, ineffective one.

(***)A Canadian price list was furnished the writer by the courtesy of F.A.McGregor, Registrar, Combines Investigation Act.

TABLE IV

COMPARISON OF PRICES ON IDENTICAL DRUG PRODUCTS IN DEPARTMENT STORES IN PORTLAND, OREGON AND TACOMA, WASHINGTON, WITH CALIFORNIA CONTRACTUAL PRICES[1]

(Figures are in percentages of contractual prices)

Classes of Products	PORTLAND Number of items	PORTLAND Average percentage of contractual price	PORTLAND Range High	PORTLAND Range Low	TACOMA Average percentage of contractual prices	TACOMA Range High	TACOMA Range Low
Antiseptics	11	9[illegible].8	109.5	37.9	110.2	121.6	100.0
Cod Liver Oils	9	92.0	112.3	79.6	94.2	101.5	83.8
Cosmetics	46	110.3	120.7	02.7	109.3	141.0	100.0
Dentrifices	9	93.7	111.1	33.1	109.1	129.6	91.4
Deodorants	10	96.0	102.1	33.0	111.3	145.8	100.0
Eye Preparations	4	100.2	125.0	70.0	107.1	102.0	112.2
Foods, Tonics & Digestive Aids	3	103.7	121.0	102.0			
Foot Preparations	9	103.9	112.9	93.8	112.9	112.9	112.9
Hair Dressing Preparations	13	99.7	107.6	91.5	113.7	134.4	88.3
Hospital Supplies	1	100.0	100.0	100.0	100.0	100.0	100.0
Laxatives	6	9[illegible].1	104.3	76.0	102.9	108.7	92.0
Manicure Supplies	18	101.7	108.7	100.0	118.4	125.4	100.0
Mineral Oils	6	124.9	172.5	93.6	114.5	137.7	93.6
Ointments	5	106.6	113.2	100.0	97.7	110.3	92.6
Patents	4	96.9	119.0	80.0	112.4	119.0	106.0
Salts	1	84.8	84.8	84.8	87.4	87.4	87.4
Salts, Effervescent	7	93.4	111.1	77.5	102.9	111.1	88.8
Shaving Supplies	15	100.1	113.8	87.9	116.2	136.3	100.0
Soaps	2	100.0	100.0	100.0	110.3	120.6	100.0
Sundries	16	97.9	103.3	87.0	108.2	125.0	100.0
Suppositories	2	105.9	111.7	100.0	120.0	120.0	120.0
Surgical Supplies	6	113.9	125.0	100.0	117.9	125.0	108.7
Totals[2]	203	101.3	113.4	89.1	108.4	119.3	99.2

Source: E. T. Grether

1/ The Portland and Tacoma stores are units of an organization with headquarters in Oakland, California. The quotations were for the period prior to the passage of the 1935 Fair Trade Law in Oregon and Washington

2/ Total percentage is an aggregate average

estingly enough, the arithmetic average of these 43 items was 102.9 per cent of California prices; i.e., 2.9 per cent higher. The range of variation, however, was wide, from 47.6 per cent to 145.1 per cent. The Canadian quotations were all on items protected in Canada. It is interesting that, although the average is so close to that of California under conditions of protection, there should be such a wide variation with respect to individual items. Apparently there are significant factors that make for variation in individual products between markets both in the case of protection as well as in its absence. To the writer the play of the forces determining individual prices and margins has always been one of the most interesting and mystifying aspects of price theory and practical price policy, particularly with respect to trade-marked, differentiated products.

Table 6 portrays the minimum retail margins on 1216 drug products under contract as of July, 1934. These 1216 items were all the products for which the writer was able to obtain wholesale quotations on the July 1934 list of contractual items. The list as a whole contained only 1571 items; hence, the computation is large enough to be entirely representative. It should be noted that this computation is made only for the July 1934 prices; the current list is considerably larger and it is possible that there have been some changes in margins. The last complete list was published October 1, 1935 and contained 1899 items. On this latter list there appeared 503 new items, whereas 183 former listings had been dropped. Since October there has been a considerable increase in the number of manufacturers and distributors so that now (i.e., January 9, 1936) there are slightly more than 300 of them compared to 253 on October 1, 1935.

. . . . . .

There was a wide variation in margins allowed dealers under contract between firms, between products in the same class, and between commodity classes. The aggregate arithmetic average was 31.02 per cent. The lowest class average margin was for tobaccos, 18.92 per cent; the highest was on sundries, 42.24 per cent. The lowest individual margin was on a shaving supply, 5.1 per cent; the highest on a cod liver oil, 81.9 per cent.* The range of variation shows many items sold far below an average operating margin figure; on the contrary many products are far above the typical dealer's average figure. Most significant is the total, aggregate average of 31.02 per cent. It is rather surprising that so high an average should appear with a plan but recently introduced, for some manufacturers were loathe to raise prices sufficiently from their cut-rate levels to allow wide margins. Almost all the products with narrow margins had been reduced very low in cut-rate establishments--often below wholesale cost. The general average of 31.02 per cent just about approximates the rough figure that has been employed by the dealers. Commonly, dealers have maintained that they needed about 33-1/3 per cent of their sales for gross margin purposes. In the Northern California Drug News, November 15, 1935 there is published the results of a cost survey, locally. This survey shows a variation in total operating expenses in the various central and northern California areas from 28.33 per cent in the Salinas district to 37.75 per cent in Marin County. The average is given as 32.07 per cent. The figure for San Francisco and the East Bay area is 32.77 per cent! Thus, in terms of this survey, the contractual minimum margins already average enough to meet the expenses of the average dealer, more

* Readers will note that all margins are figured as percentages of contractual prices--not of wholesale prices.

TABLE V COMPARISON OF PRICES IN BOSTON (1) ON FIFTY DRUG PRODUCTS IN TWENTY RETAIL ESTABLISHMENTS WITH CALIFORNIA CONTRACTUAL PRICES
(Figures are in percentages of California prices)

Product	Manufacturers Suggested Prices	Boston Mode	Boston Lowest	Boston Highest	Boston Arithmetic Average
Agarol	137.6	100.0	91.7	137.6	103.6
Alka-Seltzer	111.1	111.0	90.7	111.1	105.5
Aqua Velva	128.2	115.3	97.4	128.2	97.4
Beecham's Pills	113.6	113.6	104.5	113.6	113.6
B F I	100.0	100.0	100.0	100.0	100.0
Blue Jay Corn pads	119.0	119.0	100.0	119.0	119.0
Bromo Seltzer	120.0	100.0	96.0	120.0	100.0
Citrocarbonate 4 oz	112.3	100.0	88.7	112.3	98.8
Colgate's tooth paste	111.1	105.5	94.4	111.1	105.5
Collyrium	116.6	98.3	98.3	166.6	101.6
Cutex Nail Polish	112.9	112.9	100.0	112.9	112.9
Dextri-Maltose No. 1	111.9	88.0	88.0	111.9	94.0
Dr. West Tooth brush	106.3	106.3	70.2	106.3	100.0
Eveready blades	129.6	129.6	100.0	129.6	118.5
Ex-lax	108.6	108.6	82.6	108.6	100.0
Gem blades	129.6	129.6	96.2	129.6	122.2
Gillette blades	100.0	100.0	100.0	100.0	100.0
Glazo liquid polish	108.6	108.6	100.0	108.6	108.6
Hind's honey and almond	128.2	100.0	100.0	128.2	112.8
Ingram's shaving cream	120.6	120.6	89.6	120.6	117.2
Innerclean	106.3	106.3	95.7	106.3	104.2
Iodent tooth paste	128.2	100.0	92.3	128.2	105.1
Ipana tooth paste	128.2	100.0	87.1	128.2	102.5

(1) The writer is indebted to Robert B. Wentworth of Brookline, Massachusetts for the collection of Boston data.

TABLE V (Cont'd)

Product	Manufacturer's Suggested Prices	Boston Mode	Boston Lowest	Boston Highest	Boston Arithmetic Average
Jiffy tooth ache drops	100.0	100.0	100.0	100.0	100.0
J & J Baby powder	131.5	100.0	94.7	131.5	110.5
Kruschen salts	107.5	107.5	94.9	107.5	102.05
Lavoris	119.0	119.0	100.0	119.0	119.0
Listerine antiseptic	108.6	108.6	100.0	108.6	104.3
Listerine tooth paste	131.5	131.5	100.0	131.5	126.3
Lucky tiger	126.5	88.7	92.4	126.5	113.9
Lysol	116.2	104.6	100.0	116.2	109.3
Mennen's talc for men	131.5	131.5	100.0	131.5	126.3
Mentholatum	111.1	92.5	92.5	111.1	100.0
Murine	122.4	120.4	100.0	122.4	118.3
Nervine	112.3	100.0	100.0	112.3	102.2
Noxzema cream	128.2	128.2	100.0	128.2	125.6
Omega Oil	120.6	113.7	113.7	120.6	113.7
Palmolive after shave	128.2	115.3	87.1	128.2	115.3
Palmolive shampoo	108.6	108.6	91.3	108.6	104.3
Palmolive soap	100.0	100.0	80.0	100.0	100.0
Pebeco tooth paste	128.2	100.0	92.3	128.2	105.1
Phenolax wafers	120.0	100.0	92.0	120.0	104.0
Pinaud's Eau de Quinine	153.3	133.3	92.0	153.3	125.3
Prophylactic tooth brushes	116.2	104.6	86.0	116.2	106.9
S. T. 37	100.0	100.0	70.0	100.0	94.0
Squibb's Cod Liver Oil	106.3	95.7	91.4	106.3	100.0
Unguentine	128.2	115.3	100.0	128.2	112.8
Vaseline hair tonic No. 1	135.1	108.1	89.1	135.1	116.2
William's shaving cream	120.6	120.6	93.1	120.6	117.2
Wyeth adult suppositories	140.0	100.0	92.0	140.0	104.0
Total	119.8	108.4	94.1	119.8	108.4

Source: Prepared by E. T. Grether

TABLE VI

MINIMUM RETAIL MARGINS ON PRODUCTS IN THE DRUG TRADE IN CALIFORNIA UNDER THE CALIFORNIA FAIR TRADE LAW, JULY, 1934

(Margins expressed as percentages of retail prices)

Class of Produce	Number of Items	Range		Arithmetic Averages
		Low	High	
Antiseptics	62	10.3	70.0	29.07
Cosmetics	336	6.2	55.0	32.69
Cod Liver Oils	50	15.5	81.9	31.31
Cough & cold preparations	24	7.3	50.0	34.2
Dentrifices	34	14.4	58.8	27.6
Deodorants	14	13.8	33.4	25.26
Effervescent	13	15.8	46.0	24.91
Eye Preparations	6	16.7	50.0	28.66
Foods, Tonics, etc.,	55	16.4	40.0	27.9
Foot Remedies	51	24.8	64.0	30.44
Hair Preparations	40	9.5	34.5	24.84
Hospital Supplies	37	14.7	61.0	36.05
Household Remedies	13	11.8	48.7	33.3
Laxatives	24	20.0	43.8	32.2
Liniments	13	13.8	33.4	26.52
Mineral Oils	12	8.2	71.9	34.5
Miscellaneous	42	15.7	45.9	30.73
Nasal Preparations	6	20.6	33.3	30.6
Ointments	30	9.2	49.7	29.06
Patents	43	18.8	55.3	31.7
Pharmaceuticals	24	13.9	44.9	28.4
Pills, Tablets & Capsules	43	13.0	63.2	31.2
Salts	4	22.4	50.0	41.45
Shaving Supplies	58	5.1	62.4	22.6
Soaps	18	17.0	65.2	31.94
Sundries	112	13.1	58.5	42.24
Suppositories	8	24.1	50.0	21.73
Tobacco	44	13.0	26.9	18.92
Total (1)	1216	5.1	81.9	31.02

Total Average is an aggregate average, not an average of the class Average.

The range is the lowest and highest of all the items not of the class averages

Source: Prepared by E. T. Grether.

TABLE VII

RETAIL MARGINS FOR TWENTY-SIX CLASSES OF ARTICLES IN THE DRUG AND CHEMICAL BUSINESS IN GREAT BRITAIN UNDER THE PROPRIETARY ARTICLES TRADE ASSOCIATION

(Margins expressed as percentages of selling prices)

Class of Article	Number of Brands	Average Minimum Margin*	Range of Minimum Margins	Average Maximum Margin*	Range of Maximum Margins
Antiseptics (includes mouth washes and gargles)	26	32.8	23.6-50.0	34.6	25.0-50.0
Cod Liver Oil	5	33.7	25.0-38.2	35.9	25.0-41.5
Face creams (includes cold, vanishing and cleansing creams)	37	31.5	20.0-46.5	34.2	25.0-52.6
Foods (includes tonics)	54	26.0	18.7-39.7	27.0	18.7-43.1
Hair tonics	17	30.5	16.7-43.1	32.8	16.7-46.1
Insecticides	8	35.0	29.0-40.0	37.8	33.3-40.0
Laxatives	25	30.5	20.0-50.0	32.4	25.0-50.0
Liniments	14	28.0	18.0-44.4	31.5	20.0-47.1
Manicure supplies	7	32.8	29.5-33.3	37.8	34.6-39.7
Ointments	38	26.0	16.7-39.7	28.5	16.7-43.1
Perfumes	12	30.0	25.0-33.3	32.0	27.0-34.2
Pills	30	23.1	15.2-31.5	26.4	16.7-39.7
Powders, face	24	31.0	20.0-33.3	35.5	32.0-42.8
Powders, talcum (includes bath)	20	31.5	20.0-46.1	36.3	28.0-50.0
Shampoos, liquid	13	33.7	25.0-48.1	37.5	25.0-50.0
Shampoos, powder	7	30.0	25.0-33.3	35.0	25.0-43.5
Shaving brushes	2	35.0	33.3-37.8	37.1	36.7-37.8
Shaving creams (tubes)	9	30.5	23.1-39.7	33.3	23.6-43.8
Shaving soaps (cake and powder)	8	27.5	23.1-33.3	32.0	23.6-43.1
Shaving sticks	11	31.5	22.5-37.5	37.3	22.5-43.1
Soaps, toilet (includes bath soap)	19	27.5	16.7-33.3	30.5	16.7-41.0
Soaps, medicinal (for human use)	17	26.0	16.7-33.3	27.5	16.7-35.9
Toilet waters	14	32.4	25.0-43.1	33.7	38.5-43.1
Tooth brushes	4	37.5	33.3-42.8	41.8	35.0-46.1
Tooth pastes	22	31.0	25.0-37.5	36.3	25.0-47.9
Tooth powders	11	34.2	25.0-50.0	38.6	25.0-50.0
Total	454	29.5**	15.2-50.6#	32.4**	16.7-52.6#

SOURCE: Prepared by E. T. Grether.

* Arithmetic average

** Total average is not an average of averages, but an aggregate average

\# Not the range of average margins, but of individual margins in the total of 454 items

TABLE VIII COMPARISON OF RETAIL MARGINS IN GREAT BRITAIN AND SAN FRANCISCO ON IDENTICAL ITEMS

(Margins expressed as percentages of selling prices)

Class of Article	Number of Brands	San Francisco: Average Minimum Margin	San Francisco: Range of Minimum Margins	San Francisco: Average Maximum Margin	San Francisco: Range of Maximum Margin	Great Britain: Average Minimum Margin	Great Britain: Range of Minimum Margins	Great Britain: Average Maximum Margin	Great Britain: Range of Maximum Margins
Antiseptics (includes mouth washes)	4	27.5	26.5-27.5	31.5	30.0-34.2	28.0	25.0-33.3	30.0	25.0-33.3
Asthma remedies	2	29.6	27.5-30.0	35.9	34.6-37.1	23.1	20.6-25.0	23.1	20.6-25.0
Creams (face)	9	26.1	17.3-35.5	31.2	21.3-38.6	30.3	25.0-34.2	33.0	30.0-41.5
Dentrifices (pastes).	5	23.1	15.3-30.0	27.6	19.4-33.3	32.0	25.0-34.2	35.0	26.5-39.7
Digestive aids	2	30.0	26.0-33.3	36.7	32.4-40.1	23.6	21.9-25.0	26.5	25.0-28.0
Foods (includes tonics)	3	30.0	15.3-37.9	36.3	23.6-43.8	26.3	20.0-33.3	28.5	21.9-33.3
Hair tonics	2	29.6	26.0-32.4	36.3	33.3-39.0	23.6	21.9-25.0	32.0	30.5-32.9
Headache remedies ...	3	33.3	23.1-40.8	37.9	32.0-40.8	33.3	33.3	36.3	33.3-41.5
Inhalants	5	31.5	31.0-32.4	38.2	37.5-39.0	25.0	20.0-30.0	27.0	20.0-35.5
Laxatives	10	26.0	18.0-33.7	34.1	26.5-47.5	26.0	20.0-33.3	28.7	20.6-33.3
Liniments	7	31.2	27.0-34.6	37.7	34.2-40.8	23.0	20.0-33.3	24.9	20.0-33.3
Ointments	7	25.4	15.3-30.5	32.6	23.6-37.1	24.6	20.6-31.0	29.6	20.6-39.7
Pills	11	26.5	10.7-35.5	33.0	20.4-41.0	21.0	15.3-25.0	26.0	19.4-39.7
Powders (face)	6	28.3	15.9-35.5	31.5	20.0-38.6	32.0	30.0-33.3	35.5	33.3-38.6
Powders (talcum)	3	37.1	34.2-39.7	41.3	37.5-43.5	28.2	25.0-30.5	34.9	30.5-37.5
Remedies (misc.)	9	28.7	17.4-39.4	35.7	26.0-45.4	23.0	18.0-26.0	25.5	20.0-35.0
Soaps (medicinal) ...	4	24.2	13.0-30.0	28.1	17.4-33.7	26.0	20.0-30.0	28.8	25.0-32.0
Miscellaneous toilet articles	14	30.7	25.0-35.9	34.7	31.0-39.0	27.5	20.0-33.3	33.1	20.0-38.6
Total	111	23.5		34.0		26.5		30.0	

Source: Prepared by E. T. Grether

efficient and limited service dealers would be allowed a very nice basis for net profit--if they obtained their old volume. Also, since these margins were computed from the regular published wholesale list, dealers may receive free deals or extra discounts at times on some of the items.

It may be of interest to contrast these margins with those in Great Britain where resale price maintenance is old and well-established, having been put up on an associational basis in 1896 when The Proprietary Articles Trade Association was founded. Table 7 contains the class averages and totals for a random sample of 454 items taken from the 1933 published list of The Proprietary Articles Trade Association. In this case it was possible to list both minimum and maximum margins because special discounts, etc. were published. The aggregate average of minimum margins was 29.5 per cent; for maximum margins it was 32.4 per cent. A glance at the table will disclose a wide variation in margins between items and classes.

Table 8 represents a comparison of margins on 111 identical items in Great Britain and San Francisco. The aggregate average of minimum margins was 26.5 per cent for these 111 items in Great Britain; the aggregate maximum margins, 30.0 per cent. Since this computation was for the period before fair trade contracts were effective, it was impossible to contrast these margins with the specific contractual margins in San Francisco. Instead a comparison was made between the British margins and those that would have been received by San Francisco dealers if they had sold at the prices recommended by the local association and had purchased at the published wholesale prices. Figured on this basis, the total average of the San Francisco minimum margins was 28.5 per cent, and of the maximum margins, 34.0 per cent. That is, the San Francisco recommended margins averaged from two to four per cent above those in Great Britain. On this basis (if proper) the actual average margins under contract on July 1, 1934 in San Francisco were approximately as one should expect. It is usually considered to be true that operating expenses in Great Britain are slightly lower than in the United States.*

Beyond these questions of the average margins for classes of products and the aggregate margin there remain a number of interesting questions concerning individual margins in relation to the age, reputation, and degree of monopoly power exercised by given firms and of margins in relation to fast moving items compared with slow moving items, and of well-known highly advertised products compared with less well-known items, especially private brands. A priori, margins should be narrower for products of old, well intrenched firms, and for highly advertised and fast moving products than for others. But a priori reasoning is peculiarly treacherous for problems of this sort.

(*) Tables VII and VIII are reproduced from the writer's study, "Resale Price Maintenance in Great Britain." While in Great Britain the writer saw no thorough-going studies of operating expenses in the retail drug business. A small study that he had access to showed gross operating expenses of about 20-30 per cent.

IX. THE ECONOMIC EFFECTS OF RESALE PRICE CONTROL UNDER THE CALIFORNIA FAIR TRADE LAW

The first economic problem is that of the effects of resale price control under the California Fair Trade Law upon the competitive access to the market within the State. That is, does resale price control tend to improve the access to, and position in, the market of some suppliers and retailers at the expense of others? This question is one that involves the long run effects of the resale price control, and therefore, it is clear that sufficient time has not elapsed to allow a conclusive answer, expecially since the market has been under the general influences of the business depression. Furthermore, a conclusive answer to this question involves access to volume of sales data which are not available. Therefore, the comments that follow should be considered of an extremely tentative nature.

It seems that there can be little reason to dispute the assumption that effective resale price control would throw a larger proportion of the volume of business of nationally advertised proprietaries and of staple, standard goods to the smaller, independent dealers. This is the faith that lies behind the fervor of these dealers; the general evidence justifies the belief to date. In more prosperous times this result should be even more marked. Conversely, the competitive position of the lower class, lower cost, cut-rate institutions should be weaker with respect to the sale of nationally advertised and staple goods. This would be a serious blow because their merchandising program is based upon the quick turnover of fast selling items at prices below the market. Evidence is still inconclusive, but it appears that these institutions have been losing business on these staple, controlled items. However, the final conclusion cannot be foreseen as yet because these institutions have four competitive devices which are being employed to strengthen their position: (1) pushing the standard lines that are not controlled; (2) featuring lines that are not well known; (3) pushing their own or other private brands; (4) using non-drug merchandise for loss leader purposes. The assumption of the organized retail druggists is that these devices will not recoup the losses on controlled items; hence, there will have been a relative decline in the competitive position of cut-rate firms. It is impossible to predict the outcome as yet, especially because of the absence of normal market conditions. Some of the stronger cut-rate houses feel confident that they will be able to establish their own private brands if forced to. A number of these firms have already built a considerable volume under their own labels.

It seems that the larger, older, well established, "respectable" chain systems are in the strongest position to capitalize upon resale price control. By selling controlled goods at minimum prices they are able to build a reputation for selling these items at lowest prices; in addition, they have the reputation, prestige and a large enough number of outlets to do a good job of pushing their own private lines. As large institutions they are able to employ mass advertising media and are able to establish their own lines much more effectively than individual, small dealers. Unfortunately, no data have been collected to verify or disprove this hypothesis.

The effects upon department stores should be variable. The stores serving an upper class and upper middle class clientele should not be particularly affected. The lower class stores will have the same problems of the cut-rate drug stores; that is, they are forced to push non-controlled goods and their own brands. In addition, they are in a strong position to feature non-drug merchandise for loss leader purposes. A well-established department store should be able to build its own brands more effectively than the independent specialists. Department stores have, of course, demonstrated this ability in recent years.

The effects upon wholesalers are difficult to foresee. In so far as volume is thrown to smaller dealers they should gain unless the enforcement of resale price control leads to a larger amount of direct selling. From this standpoint, it is decidedly to the interest of wholesalers to become the policing agencies of manufacturers under their own and omnibus contracts. The problem becomes complicated by wholesale private brand merchandise. Wholesalers are in a strong position because many dealers are tied closely to them under credit controls. Yet the repercussions of a major effort to build private labels cannot be known as yet.

From the standpoint of the manufacturers of well-known nationally advertised goods the problem is essentially one of the extent to which private labels may be established in competition with them. To date, it appears that the larger, better known firms have profited by resale price control. It seems to the writer that the result is bound to be variable between firms depending upon the peculiar circumstances that are present; but that on the whole resale price control should continue to strengthen the position of these larger firms with national reputation. However, the private brand threat of cut rate institutions, wholesalers and chain stores is serious.

From the standpoint of the welfare of the great mass of small dealers there is an intrinsic threat to the system of resale price control in its attraction to new dealers if it matures into a going mechanism. Guaranteed margins and stabilized conditions are ideal magnets for new enterprises. Eventually, the trade will be forced to grapple with this problem unless professional and legal requirements alone are sufficient to limit numbers. If no adequate control of numbers in the business is developed (or is inherent in professional requirements) then the whole plan should eventually topple under its own weight.

In the second place, there is the economic problem of the effects of resale price control upon consumers. This problem resolves itself largely into a question of the relative prices of goods in relation to the quality of the goods and of the merchandising services given by dealers. Much of the agitation for resale price control would disappear if consumers thoroughly appreciated differences between the quality of merchandising service and the cost of these services. Two identical products purchased at different types of merchandising institutions do not represent identical purchases because of variable delivery, credit, personal selling, professional and convenience services attached to the products. The small, independent dealers argue that resale price control

allows them to improve the quality of their services, especially those of a professional character. The fact that neighborhood drug stores obtain so large a volume indicates that consumers appreciate this combination of professional service and merchandising convenience which they offer.

Without doubt those consumers who wish to buy standard drug products with a minimum of professional attention and merchandising services are harmed by resale price maintenance, except in so far as they are able to obtain an equivalent quality under private labels. Even so, they may not obtain an equivalent income of enjoyments, because of the absence of the important element of "reputation." All of the price studies above established the basis for the conclusion that that portion of the public which has purchased standard goods from cut-rate institutions would suffer by control. Beyond this, there is an imponderable question of the quality of the other goods which are often purchased by these customers.

Conversely, it appears that the position of the consumers who are attached to the smaller, especially the neighborhood, stores is improved by resale price control because they will continue to purchase at prices no higher than previously, perhaps even lower as contractual prices became the going prices. It will be recalled that contractual prices stood approximately half-way between full, suggested prices and the bottom cut prices of 1933 in San Francisco.

Whether contractual prices are, and remain, lower than the former prices in the great mass of independent stores is partly a matter of the width of the margins given dealers. Table 6 shows that the 1934 margins already averaged 31.02 per cent of contractual prices. Since margins were this wide so early in the plan it might be assumed that there would be a tendency for them to widen as manufacturers and distributors competed for the favor of dealers. However, the issue is not so simple for manufacturers realize that there is a connection between the price level and volume of sales and will resist both an increase in prices and a reduction of their own margins. The writer's prediction is (based upon British experience) that some margins will widen for a brief period and hence the general average will expand slightly; but that the long run tendency (if the system matures) will be toward a narrowing of margins.

Whether consumer prices rise, remain constant, or fall is not entirely a matter of the amount of dealer margins but is also related to the distribution of the consumer's price between the various market intermediaries. Much of retail pricing can no longer be analyzed on a horizontal plane; allowance must be made for vertical influences. The essence of formal resale price control is that these vertical influences are specifically brought to bear and become affected by some amount of organized bargaining between the groups in the trade. In the absence of formal resale price control, dealers complain that many well-known products must be sold by them without adequate margins or even below their wholesale cost. In case the dealers prefer to hold to their margins (as the bulk of the smaller dealers actually do) then there is some shift of patronage to cut-rate stores. Under the conditions of resale

price control where dealer margins are recognized, their amount becomes partly based upon bargaining between the suppliers and dealers. Here, obviously is a pricing situation where ordinary competitive pricing theory does not provide the basis for an explanation. Likewise, the newer theory of monopolistic and imperfect competition is inadequate because the forces in this problem are focused vertically, not merely horizontally. The point is that in this instance the pricing situation focuses not merely the forces of monopolistic competition horizontally between manufacturers in the same group, and wholesalers and retailers in the same markets and on the same level, but also the vertical problem of determining upon the distribution of the consumer's dollar between the various intermediaries. There is no basis in economic price theory to predict the result; it is possible that the outcome may represent a compromise in which manufacturers are forced to take smaller margins to compensate the guaranteed margins of dealers. If so, two conclusions are evident: (1) the pressure of manufacturers will be toward narrowing dealer margins, assuming prices remain the same; (2) consumer prices need not be raised to provide the margins for dealers.

The mere statement of the problem throws into relief a fundamental theoretical aspect of the whole matter. It will be recalled that the privileges of the California Fair Trade Law can be enjoyed only by producers of trade-marked commodities "in fair and open competition with commodities in the same general class." This statement in the law suggests two presumptions: (1) that monopoly and fair and open competition are at opposite poles; (2) that the presence of monopoly would deny the privileges of the statute. As a matter of fact, "fair and open competition" is possible of precise definition only in terms highly abstract and unrealistic. Conversely, an adequate, abstract definition of monopoly becomes equally abstract and unrealistic, except for logical purposes. In the great majority of pricing situations there are intermingled in a highly variable and complicated fashion elements of abstract competition and abstract monopoly; their complex, necessarily partaking of both, --is neither. In the retail business, dealers possess elements of monopoly in their locations, reputations, goodwill, personality, trade connections and in the control of the buying habits of their customers, as well as in miscellaneous special merchandising services. The manufacturers of trade-marked goods possess monopoly rights and powers in their trade marks, formula, reputations and goodwill, personalities and abilities of executives, trade connections, deeply rooted trade customs and habits built about them, and in the business strategy that these elements make possible. In this report, time and space do not allow grappling with the horizontal aspects of these monopoly powers; i.e., their relative weight and influence in relation to competitors in the same class and on the same level. But it is highly important that the significance vertically be discussed for the relative freedom of a given manufacturer of trade-marked goods from the pressure of abstract, simple competition (i.e., the competition set up in economic logic) has significant repercussions upon the distribution of the consumer's dollar between the intermediaries, vertically speaking. Manufacturers with large monopoly power have demonstrated in the past that they are able to obtain and maintain the distribution of their products without rewarding

dealers at all (at times) or without compensation proportionate to the expense involved. Resale price maintenance fostered by organized dealers replaces the individual dealer by a bargaining group which has demonstrated strength somewhat equivalent to that of the manufacturer. The impact of this new force brought into vertical relations is to force either a re-apportionment of the consumer's dollar more favorable to dealers or an increase in prices to consumers. Both influences are operative; it would be a highly significant price study that would develop a measure of the degree of each.

In conclusion one impact of the vertical influence of resale price control upon horizontal price fixing forces should be examined. The various price studies which compared prices of California contractual items with prices on the identical goods outside the state demonstrated that the level was not significantly different but that there were wide variations for individual items. This result merely means that the arbitrary margins established by manufacturers with or without bargaining with organized dealers, although they approximate the average prior situation, quite largely destroy or inhibit the play of the local horizontal supply and demand forces bearing upon any given product. Thus a general stabilization is at the expense of flexibility in individual pricing in each market. From the standpoint of consumers (except those buying from cut-rate stores) the significance of this condition is that <u>in general</u> they are no worse off, but any individual consumer in the purchase of any individual article may be harmed or may reap an advantage.

PART IV

INTERPLAY OF FORCES IN THE DRUG INDUSTRY SINCE NRA AND PROPOSED FEDERAL STATUTES*

CHAPTER I - THE INTERPLAY OF FORCES IN THE DRUG INDUSTRY SINCE NRA

I. The Drive to Pass Fair Trade Laws

In Part III B, we have described in detail the experience of the retail drug and grocery trades under the California Fair Trade Law and Unfair Practice Act. This is considered at length because California is the only state whose State Fair Trade Law has been in effect long enough to make possible an appraisal. We shall now look into the Interpaly of Forces in the Drug Industry in the other states where Fair Trade Laws have been recently passed.

Many of the Drug Code Committees, inspired by previous attempts to pass a federal law permitting contracts for resale prices, asked for this right in their Codes. NRA refused to grant these requests. When compliance began to break under the loss limitation provision of the Retail Drug Code, the retail trade leaders decided to go back to the resale contract plan as being the next best thing. This time, however, they turned away from the federal government to the states for action.

As previously stated, ** before the Schechter decision the California Fair Trade Law as amended in 1933 was introduced into twenty-four state legislatures and had been enacted in seven states. Stimulated by the partial success of the retail drug loss limitation provision and responsive to the leadership built up during the administration of the code, the druggists of the country refused to take the code collapse without new efforts.

The retail druggists were the militant sponsors of the state fair trade laws. Other retail trades joined in the movement but were not as enthusiastic as the druggists. Except in New York, very little opposition is recorded to the proposed laws. ***

The retail druggists are better organized than any other retail trade to bring pressure on state legislatures.

Probably the principal reason for this fact is that the retail druggist is subject to more state and federal legislation than any other retailer. Every state has some sort of alcohol control law; a narcotic act; a pharmacy law; and food and drug restrictions. The operation of the Retail Drug Code and establishment of local code authorities had strengthened local state drug organizations.

---

* Prepared by Mark Merrell

** See page 174 Part III-A of this Report and page 190 of Part III-B

*** For this reason very little could be found bearing on the legislative history of the passage of these laws

In the early 1930's the druggists in California became organized under what is known in the trade as the "Captain Plan".* Groups of druggists in each Congressional District or even in small areas organized under the leadership of a Captain chosen as having entree with state legislators and the Congressman for his district. Whereas this plan was organized primarily to deal with legislative problems, it also operated in other fields. This plan of breaking down the state trade groups into small militant units became established in many other states during the drive for state fair trade laws. Whenever the State Pharmaceutical Association wanted to bring pressure for or against a law they notified the Captains who in turn immediately made contact with all the druggists in their section. During consideration of the state fair trade law, a state fair trade law committee was established and after the passage of these measures this Committee usually pressed manufacturers and wholesalers to utilize the law by issuing resale price contracts.

The interplay of forces in the drug industry while under the California State Law is presumably representative of what can be expected in those other states where the law has been enacted recently. Because the constitutionality of these fair trade laws has not been settled and because it is apparently necessary for a manufacturer to domicile in the state in order to be qualified to conduct intrastate business, many manufacturers have held back from issuing resale price contracts.

II. Pressure on Manufacturers to Utilize the Acts

Retail Druggists in the fair trade states looking to resale price contracts as the one way at the moment to accomplish price stabilization, have brought pressure on manufacturers to issue contracts regardless of legal questions involved. If a manufacturer should refuse to issue contracts, he would be led to believe that the druggists of that state would not push the sale of his products. On the other hand, if the manufacturer should meet the retailers' request he would receive active salesmanship upon his products.**

An extreme example of this was seen in the action which retail druggists in California took against a prominent manufacturer in the summer of 1935. This company cancelled its resale price contracts in July, 1935. *** Shortly afterward the retail druggists of California in retaliation refused to handle its products. This boycott was not confined to California but extended to many sections of the country. Officials of the company appeared at the annual convention of the National Association of Retail Druggists in Cincinnati in September, 1935 and offered a $25,000 check to the Association to be used in a fund to aid the passage of a federal fair trade law.

---

* See page 254 Part III-B, Chapter VI of this Study for a discussion of the Captain Plan in California

** See page Part III-B, Chapter VI of this Report "The Pressure from Organized Retailers"

*** See Part III-B for a fuller discussion of this occurrence

A manufacturer often finds it difficult to become domiciled in the ten fair trade states so that he can be assured that his resale contracts do not run counter to federal law. The recent Armand decision * made his problem more difficult since it emphasized the fact that the anti-trust laws are still in full effect and that the Miles' decision is still operative. The potential financial cost of state, corporation, sales and other taxes alone has made manufacturers hesitant to issue resale contracts in all states where they are legal.

A manufacturer who decides to issue contracts is then confronted with the problem of where to peg his prices. The retail groups press for a price that would guarantee to the independent druggist a sufficient margin to give him a net profit in handling the goods. If the manufacturer's product is subject to the competition of substitute private brands it would be suicidal for him to peg the price too high and allow this competition to cut in upon the demand he had created through his advertising. On the other hand, if he should peg the price too low he could not count on the support of the small dealers. The National Association of Retail Druggists, speaking through its executive secretary ** has demanded that the manufacturer give the dealer the usual 33-1/3% margin of profit. If the manufacturer adhered to this, in many instances with competition forcing him to peg the price below the full consumer price, it would be necessary for him to cut down either his advertising expense or his net profits. The fight to pass state fair trade laws and subsequent pressure on manufacturers to issue resale contracts came mainly from independent druggists. Retailers are receiving support from wholesalers throughout the country, chiefly from members of the National Wholesale Druggists Association who are issuing wholesaler-retailer contracts known to the trade as "omnibus contracts". Many manufacturers have indicated to their wholesalers in fair trade states that they would be willing to have the wholesalers issue contracts on their products. The wholesaler issues a blanket contract to his retail customers with the understanding that individual manufacturer's prices will become a part of this contract as they are issued. Technically, this probably makes the contract an intra-state matter. However, the question of whether a wholesaler may issue a resale price contract on some foreign manufacturer's products has never been decided in a State Supreme Court.

The National Association of Chain Drug Stores has supported independent druggists in both the passage of the state fair trade laws and their subsequent administration. This Alliance is a continuation of the part chain drug stores played in the retail drug loss limitation provision. *** The addition of the chain groups behind the price stabilization movement adds greatly to the pressure exerted on the manufacturers. The chains' support of the wholesalers in the 1933 refusal-to-sell movement, as we have stated, was most effective. Unquestionably, their

---

* See Appendix, page 337.

** See speech at 1935 Annual Convention - N.A.R.D. Journal, October, 1935.

*** See Part II, Chapter II of this report

stand behind the state fair trade laws has embarrassed certain manufacturers.

III. The Extent of Contracts Issued

The number of resale price contracts in effect is now known. However, it is clear that the drug contracts far outnumber those issued in other trades. In the January 16, 1936 issue of Drug Trade News, 156 drug manufacturers are listed who have issued resale contracts im the various fair trade states. * This list is far from being complete as only large companies have been included. The following is a breakdown of the number of contracts in each state appearing in this list.

	Number of resale contracts issued as of January 6, 1936
California	142
Illinois	39
Iowa	11
Maryland	9
New Jersey	40
New York	59
Oregon	25
Pennsylvania	35
Washington	54
Wisconsin	26
Total.....	427

SOURCE: Compiled from Drug Trade News, January 16, 1936

Many of the 427 contracts in this tabulation cover hundreds of products and, therefore, the total number of items under them cannot be estimated. The above list includes direct manufacturers' contracts and also wholesalers' omnibus contracts.

IV. First State High Court Decision

The Court of Appeals of New York on January 7, 1935 declared Section 2 of the Fair Trade Act unconstitutional. ** This was the first decision from the highest court in a state on the constitutionality of any section of the fair trade laws. Section 2 provided that a non-signer of a contract must adhere to the prices in the contract. *** The Supreme Court of California heard a case involving this provisions in September, 1935, but the decision has not yet been given.

---

* See page Appendix IV for this list of manufacturers

** See Doubleday Doran et al v. R. H. Macy & Company

*** See page of Part III-B of this Study for a discussion of Section 1½ of the California Act

The National Association of Retail Druggists immediately started to redraft a model state fair trade law designed to meet the Macy decision in New York. The proposed new law rewords several provisions of the old law to make the language clearer and includes a new provision to replace the invalidated Section 2. * This new provision makes any interference with the resale contract actionable by anyone damaged. Apparently the proponents expect to be able to prove to a court that non-signers who cut under the contract price are interfering with the contract. This procedure would apparently be more cumbersome than the mandatory nature of the old Section 2 and by the same token far less effective, in making all retailers adhere to a stipulated price.

Even before the teeth were extracted from the New York State Fair Trade law by the Macy decision, some manufacturers had already begun to use private methods of bolstering the effectiveness of their resale contracts. Several had incorporated with resale price contracts the policy of refusal-to-sell by refraining from selling to retailers who had not signed. A few further tightened this control by consigning their merchandise to the wholesalers. Because they still held title they could dictate the retailers to which their goods could be sold.

---

* See page 392 Appendix for the text of this new proposed State Fair Trade Law

V. DRUG DISTRIBUTORS' ATTACK ON MANUFACTURERS

A. The Retailers' Revolt.

The retail druggists' pressure on manufacturers to issue resale contracts and to carry through the contracts with court procedures has been intensified since the Macy decision in New York in January, 1936. They apparently plan to use trade pressures if legislative means are not sufficient.

A mass meeting of some 3,500 retail druggists held on January 14, 1936 in New York City clearly illustrates the retailers' intention of taking price stabilization matters into their own hands if it cannot be done otherwise.(*) According to a trade paper, the more conservative officers of New York trade associations were brushed aside by younger leaders who took over the meeting. The meeting began with the statement of one of the speakers that "The Boston Tea Party, or a new revolution to assert the rights of man, starts here tonight." Suggestions were made that New York druggists cut the price one cent on two prominent New York papers which had been unfriendly to the Fair Trade law, to demonstrate to them what price demoralization meant. Printed signs with the caption "Newspapers at cut prices" were given away for the druggists to use and each druggist was requested to buy four papers a day and take a loss of only four cents, but to keep the signs prominently displayed all the time. One speaker named five prominent manufacturers whose products he was not going to handle. From a recent article in Business Week it appears that this boycott received support throughout the state.(**)

(*) See Drug Trade News, January 20, 1936.

(**) From "Business "Week" of February 1, 1936 (Page 12).

"Pressure on Manufacturers"

> "Meanwhile, many manufacturers who have heretofore rendered lip service to the cause of price control, but been laggard in their active support (due in large part to their fear lest existing marketing machinery be seriously disrupted) are being rapidly converted to the great crusade.
>
> In the drug field, five of them--Squibb, Pond's, Phillips, Upjohn, and Parke, Davis--are being subjected to considerable pressure from New York state retailers who have sworn to keep their products "under the counter" until suitable price policies are adopted.

A representative of the National Association of Chain Drug Stores pledged the full cooperation of the chains of the nation with the independent retailers in the fight for improvement of prices.(*) Since the New York protest meeting certain drug leaders in Philadelphia have announced that stores in that city are taking off their shelves products of manufacturers who "do not show their intention of cooperating in the fight to uphold fair trade prices." (**)

B. Wholesaler's Revolt.

The place of the "Service" Wholesale druggists in the drug industry has been threatened by the growth of "cooperatives", by the consolidation of some fifty-four of their group into the McKesson and Robbins Chain (1929), by the increasing number of manufacturers who sell direct to retailers and recently by the United Drug Company's entry into the wholesale field. (***)

Recently they have shown signs that like the retailers they intend to take matters into their own hands. The following quotation from a paragraph in an article of "Business Week" of December 14, 1935, touches on recent attitudes of the wholesale druggists:

> "Long harassed by the necessity for handling the small drop shipment orders with little profit to themselves, and worried now by Liggett's move (through United Drug) to skim the very cream off their business by opening new wholesale houses in Chicago, Boston, Dallas, and elsewhere, drug wholesalers have adopted strong tactics to force manufacturers to support their demands for a better buying deal. And to cement their alliance with the retailers, the wholesalers' revolt .....was aimed first at those manufacturers whose performance under the fair trade laws has been something less than distinctive."

The Wholesalers' revolt took the form of flooding certain manufacturers with small drop shipment orders. This same article in Business Week" describes the Wholesalers' action in the following words:

> "Presumably it was Thanksgiving season, but that fact only served to heighten the irony of the plight in which sales managers of three big drug manufacturing houses--Lehn & Fink, Feenamint, and American Home Products--found themselves late last

---

(*) See Drug Trade News, January 30, 1936.

(**) See Drug Trade News, February 3, 1936.

(***) The United Drug Company opened its first wholesale drug house in Atlanta in the summer of 1935. These wholesale companies are set up as cooperatives and are owned by Rexall agents, whom they serve.

month. Just a day or so before the annual festive occasion the mailman plunked down on the desk of each a batch of several thousand orders. Now orders are customarily a cause for some thanks-giving in themselves, but these were all orders for 1/12 of a dozen tubes of Rebeco or two small bottles of Petrolagar to be sent to corner druggists throughout the country--orders which wholesalers had refused to handle and had forwarded to manufacturers ill-prepared for such a flood of two-bit business. Important dealer good will was at stake.

"A few days later, some half dozen other drug manufacturers .....found themselves similarly confronted with thousands of small drop shipment orders. This week, 15 additional manufacturers were slated to feel the effect of the wholesalers' revolt."

The Wholesale Druggists' boycott tapered off almost as fast as it grew "though the trade still continues to talk about who got hit and when." (*) Temporary though this wholesalers' movement may have been, taken as an accompaniment to the occurrences in the retail branch of the trade, it has forced the manufacturers to become aware more fully than ever before that the distributors of their products are up in arms to obtain what they consider a fair deal.

It would seem that if manufacturers are to satisfy these warring trade groups by giving them better margins of profit, either the advertising expenditures of manufacturers or their net profits of the past will have to be curtailed, as the horizontal competition of similar products, both nationally advertised and private brand, will prevent raising the price level very far. The old formula of increased advertising expenditures will have less effect in moving the goods off the wholesalers' and retailers' shelves while the present temper persists.

(*) See Business Week, January 4, 1936.

VI.. SUMMARY

Even before the Schechter decision, when compliance with the loss limitation provision of the Retail Drug Code began to disintegrate in the fall of 1934; druggists commenced fighting for a substitute price stablization program. They turned back to the old proposed Capper-Kelly provision and followed California's lead in having this measure which permitted resale price contracts adopted as a state law. Between the fall of 1934 and July, 1935, the California Fair Trade law as amended in 1933 was introduced in twenty-four legislatures and passed in nine states.

Following the methods of the California druggists, trade leaders in the new Fair Trade states began to try forcing manufacturers to utilize the laws by issuing resale contracts and by policing those that were issued. The manufacturer found himself in a difficult situation, first, because of the legal questions involved and the costs of domiciling in the states, and second, because it was difficult to know where to peg the contract price.

The section of the Fair Trade law which forced the contract price on non-signers was declared unconstitutional by the New York Court of Appeals. A week after this decision the retail druggists of New York held a mass meeting, indicating that they were taking price stabilization methods into their own hands. At the meeting, the retailers announced that they would refuse to deal in products of manufacturers who were not maintaining their price stabilization policies to the retailers' satisfaction.

Mass pressure from the wholesale druggists in November, 1935, increased the manufacturers' worries. This pressure took the form of a flood of small drop shipment orders relayed to the manufacturers by the wholesalers.

CHAPTER II - PROPOSED FEDERAL STATUTES

I. The Tydings Bill

The present Congress is faced with many proposed measures about price discrimination and price stabilization. One of these originates in the State Fair Trade Law movement. This proposed bill would exempt from the Sherman Anti-trust laws resale price contracts issued in interstate commerce, where the resale occurs in a state permitting such contracts. This proposal replaces the old Capper-Kelly plan.

The bill was introduced in the Senate by Senator Tydings of Maryland on January 6, 1936. A revised bill, introduced a few days later, (*) was referred to the Senate Judiciary Committee. The Schechter Decision cast some doubt on the feasibility of direct Federal resale price legislation, since under its terms similar state laws would probably be needed. The new law applied only in those states which have passed already or which may, in the future, pass laws allowing resale price contracts.

The Tydings Bill is a Federal Enabling Act designed to remove some of the obstructions that have been found in the operation of the state fair trade laws. It would eliminate necessity for a manufacturer to domicile in each of the ten fair trade states in order to qualify to do intrastate business. It also would permit a manufacturer to contract in interstate commerce with wholesalers who in turn would issue in intra-state commerce an omnibus contract with their retail dealers containing the price stipulated by the manufacturer.

II. The Patman-Robinson Bill

During the Senate Finance Committee's hearings on the renewal of N.R.A. in the last session of Congress, announcement was made in the press of the formation of the American Retail Federation. (**) This association was referred to as a new retail super-lobby. In General Johnson's testimony before the Senate Finance Committee the next day he caustically referred to the new association and to the list of its original members. (***)

On April 24th the House passed a resolution (****) authorizing a special committee to investigate the American Retail Federation.

(*) See page 389, Appendix, for the text of this Bill (S-3822)

(**) See New York Times of April 17, 1935.

(***) See Hearings of Senate Finance Committee for April 18, 1935.

(****) See House Resolution #305.

Representative Patman became chairman of this committee and hearings were begun on June 5, 1935. On June 14, 1935 the scope of the investigation was brodened by another House resolution, to include the buying practices of large organizations. (*) Hearings on the American Retail Federation's part of the investigation were completed on January 11, 1936. (**), but hearings on the Buying Practices of Large Organizations have not terminated, as the present report is written.

A bill to modify the discrimination clause of the Clayton Act was introduced by Representative Patman in the House on June 11, 1935; and on June 26, Senator Robinson soponsored the same measure in the Senate. This was referred to the House Judiciary Committee and hearings were started on July 10, 1935 (***)

On February 3, 1936, the House Judiciary Committee began hearings on a bill of similar nature introduced by Representative Utterback.(****) On the same day the Senate Judiciary Committee reported out to the Senate an amended Patman-Robinson bill and it was placed on the calendar for consideration. (*****)

The report of the committee states the purpose of this bill is to:

> "amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them. Such discriminations are sometimes effected directly in prices or terms of sale, and sometimes by separate allowances to favored customers for purported services or other considerations which are unjustly discriminatory in their result against other customers."(******)

This measure, as reported out by the Committee, broadens the Clayton-Act by prohibiting discrimination between inter and intra-state commerce and discriminations which injure competitors.(*******)

(*) See House Resolution #239.

(**) A report is expected on this phase of the investigation shortly.

(***) This bill has received active support from independent retail and wholesale grocers. The retail druggists are in favor of the measure but they have not been as active, in any degree, as they have in supporting the Tydings measure. See Appendix, page 112

(****) House Resolution #10486

(*****) See page 113, Appendix to this report.

(******) See Senate Report No. 1502, 74th Congress, 2nd Session.

(*******) The Clayton Act required a showing of general injury to competitive conditions.

It limits quantity differentials in price by empowering the Federal Trade Commission to fix the quantity scale. It stipulates that special service allowances are forbidden unless offered to all customers on proportionally equal terms. It limits brokerage fees to bona fide brokers. And it establishes damages according to the amount of forbidden discrimination or allowance.

III. Other Federal Proposals Before Congress.

Mention has been made of the Patman-Robinson and the Utterback proposals. In addition to these on January 16, 1936, Senator Borah introduced a measure to amend the discrimination clause of the Clayton Act. (*) This bill broadens the Clayton Act by forbidding a person "to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor," and also make the violation a criminal offense.

Other Federal bills have been proposed in the present Congress for the expansion of powers and scope of the Federal Trade Commission. In this category the Nye-King bill (**) and the Wheeler-Rayburn bill (***) are in keeping with statements made by the commission in their last annual report. These two measures expand the meaning of the words "competition in commerce." The Wheeler bill, for example, adds the words "and unfair or deceptive acts and practices in commerce," where it mentions "competition in commerce." (****) This makes it possible for vertical commercial relationships to be discussed whereas the present Act does not permit it. All previous fair trade conferences have been confined to one level of an industry. (*****)

The Nye-King measure provides that the Federal Trade Commission can call conferences on their own initiative. The feature is not included in the Wheeler-Rayburn proposal. Both bills, however, broaden the investigation powers of the Commission.

(*) See S.3670.

(**) Senate Resolution #3067.

(***) Senate Resolution #3744 and House Res. #10385.

(****) See Section 5 of Senate Resolution #3744.

(*****) In the discussion of codes for the drug industry it has been noted that a vertical arrangement was sought but NRA refused to consider the proposal. See Page 30, Part I, Chapter II.

A P P E N D I X

LEGAL ASPECTS OF RESALE PRICE MAINTENANCE (*)

Basically the whole movement to secure resale price maintenance through legislation and through such devices as refusal-to-sell and consignment selling started when the United States Supreme Court in 1911 declared resale price contracts between manufacturers and dealers illegal. If the Court had ruled the opposite way, and permitted manufacturers to bind their dealers contractually to maintain resale prices, present conditions of price cutting might have been totally different. It is conceivable that the intensive pressure on Congress to pass price maintenance legislation might never have materialized; retail codes, under NRA, might have contained no minimum price provisions; and state fair trade laws might have been non-existent.

Because the court's decision of 1911 has proved a turning point in the history of price maintenance, that and subsequent decisions on the same subject, assume considerable importance to this study. It is necessary to examine the status of the law as the Court has laid it down; how the Court arrived at its doctrines, and the legal economic and factual foundation of the decisions.

(*) Prepared by George J. Feldman.

SECTION I.

SUMMARY STATEMENT OF IMPORTANT PRICE MAINTENANCE DECISIONS BY UNITED STATES SUPREME COURT

"Resale price maintenance" is the term commonly used to describe merchandising devices whereby the manufacturer of a patented, copyrighted, trade-marked or branded article seeks to control the article's resale price in the hands of distributors. This method of marketing is an adjunct of modern advertising. At least it followed closely on the heels of the introduction of advertising into the modern industrial scheme, and the two appear to have grown together in importance. (*)

In the early days industry regarded the use of resale price control devices by manufacturers as a matter of right. Their most frequent employment was in connection with the sale of patented articles and proprietary medicines. To make their price maintenance plans effective, manufacturers used written contracts or agreements with distributors, forbidding the latter to resell the article below a stipulated price. (**)

Early court cases usually involved a suit by the manufacturer against a distributor for the breach of such a contract, or against some third person charged with procuring such a breach. The courts, both state and federal, were by no means uniform in their conclusions. A substantial majority held these contracts valid. The theory underlying the court decisions varied with the type of case. If the price maintenance scheme was linked with a license under a patent, the court interpreted the device as being within the scope of the patent statute, (***) and held that a price maintenance contract was, therefore, a reasonable incident to the patentee's exclusive monopoly right, and, consequently, its breach was in the nature of an infringement of this right. (****) Where the price maintenance contract referred to a copyrighted article, however, the doctrine of infringement did not apply. In 1906, an inferior Federal court declared such a contract valid (*****) on the ground that the monopoly rights under the patent and copyright statutes were analagous; but the Supreme Court later overruled this, declaring that the latter statute did not authorize the fixing of resale prices. (******)

(*) See Work Material No. 16; Resale Price Maintenance Legislation in the U.S. by H. S. Kantor, pg. 1

(**) See digest of early cases, Section II, page 13 et seq.

(***) Dr. Miles' Medical Company v. Jayne 140 F.R. 838

(****) Button Fastener Case, Section II, page 13 et seq.
Bement v. National Harrow Co., Section II, page 13 et. seq.

(*****) Authors' and Newspaper Association v. O'Gorman (1906) 146 Fed. 616

(******) Bobbs-Merrill v. Straus, 210 U.S. 339 (a digest of this case appears in Sec. II, page 13 et seq). Also Scribner v. Straus, 210 U.S. 352.

In the so-called proprietary medicine cases, lower Federal courts upheld the validity of price contracts by likening secret processed goods with patented articles and applying the patent infringement rule. (*) Thus, prior to 1911, industry could point to many court decisions upholding resale price maintenance contracts.

In 1911, however, the U.S. Supreme Court, in the Dr. Miles' and subsequent cases, rejected the entire patent infringement basis for price maintenance and held such contracts void because they involved a restraint on the alienation of title and a restraint on competition, and, therefore, were against the public interest. (**)

The outlawing of these contracts merely challenged the ingenuity of industry to invent new methods of attaining the same goal. Notice to the retailer from the manufacturer that the article was not to be sold below a "suggested" price, plus a refusal-to-sell to those who did not adhere strictly to the "suggested" price, was a method employed by the Colgate Company. The Department of Justice challenged the legality of this plan, but the Supreme Court ruled in favor of Colgate on the theory that the Sherman Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal." (***) Other manufacturers attempted other price maintenance plans. One, commonly used, was the consignment plan of the General Electric Company, described in detail in the Supreme Court decision upholding its validity. (****) The court decided distribution of the company's products through "agents" who maintained the price, was not illegal. The court laid down a test for determining what set of facts constituted an agency as distinguished from a contractual arrangement but this test was by no means clear. (*****) Nevertheless, the distinction was of paramount importance because the legality of these plans hinged on the Court's finding in this regard.

Many felt the decision in the Colgate case to have overruled, or at least to have modified substantially the Dr. Miles' decision. They also regarded it as an indication of a trend on the part of the Court to uphold any price maintenance plan short of actual contracts

---

(*) See in Re Park, 148 Fed. 421 (1905)
Dr. Miles' Medical Co. v. Platt (1906) 142 Fed. 306
Wells & Richardson v. Abraham (1906), 145 Fed. 190 aff. 149 F. 404
Jayne v. Loder (C.C.A. 3rd Ct) T.D. 21
Dr. Miles' Medical Co. v. Jayne Drug 149 T.D. 838

(**) The restraint of trade phase of this and other important cases is presented in another section of this paper, infra.

(***) See digest of Colgate case, Section II, page 13 et seq.

(****) For a digest of this case, see Section II, page 15 et seq.

(*****) See Ford Motor Co. v. Union Motor Sales Co. 24 Fed 156 (C.C.A. 6th-1917 of Curtis Publishing Co. v. Federal Trade, 260 U.S. 568; 43 Sup Ct. 210

or agreements between the manufacturer and his distributors. The Schrader case and Beech-Nut Packing case finally cleared this misconception. (*)

The Schrader case involved the execution of actual contracts requiring price maintenance. The argument stressed to the court was that the Colgate case overruled the Dr. Miles' case. The court, however, rejected this contention and held that the plan violated the Sherman Law.

In the Beech-Nut case the Court enumerated just what a manufacturer could not do to effectuate a price maintenance plan. In addition to the previous decisions outlawing express agreements, the Court forbade (1) the practice of reporting names of recalcitrant dealers (2) enrolling of dealers on "undesirable" lists until assurances were given that they would maintain a designated price (3) employing of salesmen to report such undesirable dealers (4) utilizing of numbers and symbols on products in order to detect offenders (5) utilizing of "any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the Company".

On December 11, 1935 the United States Supreme Court in denying the petition for certiorari filed by the Armand Company, Inc., (**) upheld a decision of the Circuit Court of Appeals (2nd Circuit, N.Y.) which affirmed a Federal Trade Commission order directed against the maintenance by the petitioner, through agreement, express or implied, of the resale prices of its products. The promptness of the Supreme Court's action on this case is sufficiently indicative of its present attitude.

I. Restrictive Agreements

Although, in the legal sense, great similarity exists between the conditions imposed on the sale of real estate and chattels (***), and those imposed on the resale of goods under various price maintenance plans, and despite the fact that each interferes in exactly the same way with the free alienation of title, the courts have held the former of these restrictions valid while holding the latter invalid. The courts have not directly explained this striking anomoly, but there is some indication that the movable character of the articles involved is the basis for distinction. They have used the word "movable" (****) in the text of decisions concerning price maintenance plans; stating in one case:

(*) For digest of these cases see Section II, page 15 et seq.

(**) See Armand Co. Inc. pet. v. Federal Trade Com., Section II, page 13 et seq.

(***) Technically referred to as "equitable restrictions" such a requiring that a house of a specific description be built on land sold, or requiring that houses be built a certain distance from a street, etc. These restrictions have been held good for thirty years after title to the land has passed.

(****) See John D. Park & Sons v. Hartman 153 F.H. 24, 39

"The right of alienation is one of the essential incidents of a right of general property in movables and restraints upon alienation have been regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as passed from hand to hand." (*)

II. Restrictive Agreements and Anti-Trust Laws

A restrictive agreement preventing the free alienation of title to property, according to the Supreme Court, prevents the free flow of commerce, the channels of which the anti-trust laws are supposed to keep clear. The anti-trust laws, consisting principally of the Sherman Act, Federal Trade Commission Act, and Clayton Act, do not specifically outlaw resale price control. It is the Supreme Court's interpretation that such a device unduly hinders trade that brings certain types of price maintenance within the control of these statutes.. However, the Court declared this practice to be not only an unlawful restraint of trade under the anti-trust laws, but also an illegal restraint of trade at common law. (**) The Sherman Act was designed to codify the common law of restraint of trade, adding only punitive provisions for the violation thereof. The Federal Trade Commission Act created a regulatory body, with affirmative authority to prevent unfair methods of competition as a purge for the evils of business competition. The purpose of the Clayton Act was to empower the Federal Trade Commission to arrest and control the growth of trusts and thus correct the deficiencies apparent in the operation of the Sherman Law.

III. Restrictive Agreements and the Law of Restraint of Trade

As stated before, prior to the decision of the Supreme Court in the Dr. Miles' Medical Company v. Park case, a majority of the inferior federal courts and even the Supreme Court, in cases involving patented articles, adopted the view that price maintenance restrictions on the resale of goods were valid. In several of these cases, attorneys agreed that these contracts illegally restrained trade, but for the most part, except in cases of copyrighted articles, the Courts declared the contracts within the scope of the patent monopoly and, therefore, outside the scope of the Sherman Law. Because there was a widespread belief in the validity of resale price contracts, it was only natural for lawyers preparing cases upon this question to follow the beaten path of legal precedent. Thus, when the Dr. Miles case arose, they confined their preparation to purely

---

(*) See Z. Chaffee, Jr., Equitable Servitude on Chattels, 41 Harvard Law Review at 982 et seq for a criticism of the price maintenance cases.

(**) Dr. Miles v. Park. The Common law is supposedly the body of law inherited from England by the Colonies developed by our courts, and subsequently, unchanged by statute. An involved discussion of the anti-trust laws will not be attempted here. The historical background of these laws has been adequately treated elsewhere. For a few references see: Thornton "Federal Anti-trust laws;" Oliphant "Cases on Trade Regulation; McLaughlin "Cases on Federal Anti-trust laws" Levine and Feldman "Does Trade Need 'Anti-trust laws'"; Worksheet #1, Cases on Unfair Competition and Restraint of Trade by George Feldman.

legalistic issues. In other words, the validity of an important merchandising practice widely employed by manufacturers and involving a factual situation capable of economic appraisal, was allowed to depend on the technical legal interpretation of whether or not proprietary medicines and secret processed goods were in the same classification as patented articles. (*)

Only when lawyers, economists, and business men understand that price maintenance is a device with definite economic effects on the manufacturer, the distributor, labor, and the consumer and that these effects are capable of factual determination, will they appreciate the barren nature of the record before the Supreme Court in the Miles' case. With no evidence before it on the economic effects of price maintenance contracts, it is no wonder that the Court, speaking through Justice Hughes, condemned these contracts as being in restraint of trade. However, the Court indicated that not all contracts or plans that restrain trade are illegal, saying: -

> "With respect to contracts in restraint of trade, the earlier doctrine of common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise, restraints of trade are void against public policy. As was said by this Court in Gibbs v. Baltimore Gas Co., 130 U.S. 409, 'The decision in Mitchel v. Reynolds, S.D. Smith Leading Cases, 407, 7th Eng. Ed, 8th Am ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade: but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Roumillon v. Rousillon, 14 Ch. D. 351: Leather Cloth Co., v. Lorsont, L.R. 9 Eq. 345."
>
> "The true view at the present time" said Lord McNaughton in Nordenfelt v. Maxim Nord, etc., Co. 1904 A.C. p. 565, "I think is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interferences with individual libery of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to PUBLIC policy, and therefore void. That is

---

(*) For a detailed discussion of facts in this case see digest in Section II, page 13 et seq.

> the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is improved, while at the same time it is in no way injurious to the public."

This quotation admirably reflects the evolution of the law as a function of economic conditions and economic theory. It sets forth that contracts in restraint of trade should be adjudged in the light of the surrounding economic conditions.

The persuasive facts in the early court cases may be helpful in showing how courts arrive at the conclusion that given contracts do or do not restrain trade. In what economic setting did the first court cases arise, and in what way did changed conditions influence the courts? When the case of the Tailers, etc., of Ipswich arose in 1614 (*), society had just left feudalism behind. The economic structure of the community was comparatively simple, principally because inter-community commerce scarcely existed. Each member of the community was dependent upon the other for his livelihood. Each town had its butcher, its baker, and its candlestick maker, and enforcement of laws against "engrossing"(**) "regrating" and "forestalling" was strict. The producer sold directly to the consumer and the public regarded middlemen as base criminals. It was under such conditions that a craftsman agreed with his only competitor in the community not to engage in his craft for a period of six months. When the competitor brought suit to enforce this contract, it is not difficult to understand, in view of the conditions, why the Court became profane and threatened to throw the plaintiff in jail. The deprivation of a man's right to ply his trade was a deprivation of his livelihood and meant that he was likely to become a public charge. (***)

(*) 11 CO. 53, 53A

(**) These laws, briefly stated, made it a crime to purchase foodstuffs for the purpose of reselling them to the public market or otherwise, or to do specific acts which might have enhanced the price. For detailed explanation, see Oliphant "Cases on Trade Regulation."

(***) In 1434, it was written that "the crafts have been devised for this purpose, that everyone should earn his daily bread, and nobody shall interfere with the craft of another. By this, the world gets rid of its misery and everyone may find his livelihood." See Oliphant "Cases on Trade Regulation"(1923).

The early courts were concerned not only with the fact that such a contract tended to burden the community with a public charge, but also with the fact that the community was deprived of the product of a skilled craftsman. Furthermore, the remaining craftsman was in a position to exercise monopoly control. These points of inquiry into basic economic conditions not only form the ingredients making up the public interest, but also influence the legal validity of contracts and devices in restraint of trade. When, as the court said, the "condition of things" and "state of society" changed, the courts, notwithstanding arguments based on older authorities, modified their previous rulings. What was the "state of society" when this change came about? Inter-community travel and commerce, due principally to better roads, began to thrive. When the guild system disintegrated, with the accelerating growth of trade in the commercial revolution, the impact of covenants on the public welfare changed drastically. The increased mobility of product, craftsman and interprise altered both the possibility that the covenantee would become a public charge and the monopolistic position of the covenantor. The covenantee could move to a new location, and products such as he made could move more freely into the locus of the covenant. The courts, taking this change into consideration, modified their previous rulings with respect to such covenants.

Despite these radical developments, however, the courts were still concerned with the same basic factors regarded as essential to the protection of the public interest, consequently they examined with unusual care the actual value of the consideration given in return for a covenant not to engage in a craft in a particular place. (*) They were concerned chiefly with determining whether the consideration was sufficient to take care of the covenantee during the life of the covenant, and when it was appeared conclusively that this was ample, the court no longer viewed the covenant as bal per se.

In these later cases it appeared that the development of inter-community commerce properly safeguarded the public welfare. The covenant could not deprive the community of the products of the skilled craftsman, because similar products came in from other communities. For the same reason the public was protected against possible monopoly abuse.

In Mitchel v. Reynolds (**), generally regarded as the forerunner of the modern law of restraint of trade the court held valid as contract assigning the lease of a bake house for five years and an agreement not to trade as a baker in the parish during the term. In this case, the Court made the following comprehensive review of the contemporary economic situation: -.

(*) See Broad Jelleff GRO. Inc. (M.B. 1630)

(**) 1. P. 181 (1711). Note discussion of this case in quotation from Justice Hughes' opinion in Miles case.

(Mitchel v. Reynolds:)

"Affirmatively: the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, first, to the party, by the loss of his livelihood, and the subsistence of his family; secondly, to the public, by depriving it of an useful member.

"Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likely from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

"Thirdly, Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not inforce such contracts by any action. See Puff. lib. 5, c. a. 3; 21 H.VII, 20.

"Fourthly, the fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked, with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

"Fifthly, the law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void. Barrow v. Wood, March, Rep. 77; Mich 7Ed. III65; Aleyn, 67, 8 Co.121.

"But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

"Resp. I do not see why that should not be shewn by pleading; though certain the law might be settled either way without prejudice; but as it now stands the rule is, that wherever

such contract stat indifferenter, and for ought appears, may be either good or bad, the law presumes it prima facie to be bad, and that for these reasons:

"First, in favor of trade and honest industry.

"Secondly, For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be overborne by the apparent mischief.

"Thirdly, For that mischief (as I have shewn before) is not only private, but public.

"Fourthly, There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby; for it is to be observed that tho it be not shewn to be the party's trade of livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds on that reason, (viz) as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

"As first, that all contracts where there is a bare restraint of trade and no more, must be void; but this taking place only where the consideration is not shewn can be no reason why, in cases where the special matter appears so as to make it a reasonable and useful contract, it should not be good.....

"Secondly, it answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a nudum pactum, but every contract must have a consideration, either expressed, as in assumpsits, or implied, as in bonds and covenants, but these latter, tho they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seised, which is void without consideration, tho it be a compleat and perfect deed.

"Thirdly, it shews way a contract not to trade in any part of England, tho with consideration is boid; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, tho it may be, to restrain him from trading in some unless he intends a monopoly, which is a crime.

"Fourthly, This shows why promises in restraining of trade have been held good; for in those contracts it is always necessary to show the consideration so that the presumption of injury could not take place, but it must be governed by the special matter shewn. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hall in 2 H.V. fol. quinto; for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare that he would not follow it any more, etc., at which instant some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not work at it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loo, should take advantage of the forfeiture, and put the bond in suit; I must own, think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that Judge expressed, though not his manner of expressing it.....

"The application of this to the case at bar is very plain; here the particular circumstances and consideration are set forth, upon which the Court is to judge, whether it be a reasonable and useful contract.

"The plaintiff took a broker's house and the question is, whether he or the defendant shall have the trade of this neighbourhood? The concern of the public is equal on both sides.

"What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, (viz) the term of five years.

"To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

"For these reasons we are of opinion, that the plaintiff ought to have judgment".

As economic facts and theories continued to change, so also changed the view of the courts. The arrival of the industrial revolution and the development of the laissez faire theory of competition, gave rise to very different court opinions from those

discussed heretofore. In Horner v. Graces (*) a dentist assistant entered into an agreement to serve for five years. One of the provisions in the agreement was that his services might be terminated on three months' notice. This agreement also contained a provision to the effect that the assistant would not practice within a hundred miles of York after his employment ended. The Court in holding the agreement had because it was more extensive than necessary to protect the employer, said:

> "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such as to afford a fair protection to the interest of the party in favour of whom it is given and not so large as to interfere with the interest of the public." (**)

The Court also said:

> "Unless the case was such that the restraint was plainly an obviously unnecessary the court would not feel itself justified in interfering." (***)

In Hitchcock v. Coker (****) the plaintiff took the defendant as an assistant in the druggist business at a stipulated annual salary. In return, the defendant agreed not to do business as a druggist in Taunton or within three miles thereof at any time. The Court held that this condition was reasonably necessary to the protection of the plaintiff's good will and that, consequently, the condition though unlimited in time, was valid. Previously, the rule was that only contracts limited as to time and space were valid. The court also departed from the original practice of examining the adequacy of the consideration, applying the rule that any consideration enough to support a simple contract was sufficient. This departure is attributable directly to changed economic conditions. In Nordenfeld v. Maxim, etc., Co. (*****) the court abandoned the rule requiring that contracts be limited as to time and space, in favor of a general standard of reasonableness. The Court upheld and enforced by injunction a contract involving a world-wide restraint for twenty-five years in connection with the sale of a business with a world market.

The simple structure of society of the earlier periods may have enabled the courts to scrutinize and evaluate more efficiently the

---

(*) 7. Bing. 735 (1831)

(**) See page 743 of opinion

(***) See page 744 of opinion

(****) 6 Ane 436 (1857)

(*****) A. C. 535 (1894)

economic effects of restrictive agreements. Our modern courts, in passing upon the validity of price maintenance plans, have not measured or evaluated the facts in a corresponding manner. This failure may be caused in part by the constantly increasing complexities of the present social pattern or the fact that there is no crystallized current economic philosophy. Whatever the reason, the fact remains, and no one has taken steps to see that essential facts appear in the record. (*) On the contrary our courts have reached conclusions concerning the economic effect of restrictive devices without the existence of supporting factual data. (**)

The conclusion that price maintenance by restrictive agreement is in restraint of trade and hence against the public interest, but that price maintenance through "agents", or the use of one's market position to refuse to sell, is not in restraint of trade and hence not against the public interest, is based upon legal distinctions derived from a succession of cases. Many of these cases illustrate earlier forms of economic organization and hence earlier phases of the conflict between public and private interests. The present economic relation of distributors to manufacturers raises a question whether the accredited legal distinction remains a sufficient guide to the reasonableness of contractual restraints.

(*) They could remand cases to the Court of first instance, or the Federal Trade Commission for essential data.

(**) In addition to the fact that the Dr. Miles Medical Co. v. Park case arose and was decided on legal technicalities, the other principal cases before the Supreme Court were likewise barren of factual information which would enable the court to determine the economic effects of the respective plans before them. The Colgate case (U.S. v. Colgate Co. see digest of case in Section II) was based on the conclusion of the lower court's interpretation of the indictment against the company. The Beech-Nut case (F.T.C. v. Beechnut Co., see digest of this case in Section II) went up on an agreed statement of facts. The only materials that might be classified as economic appearing in the record were speculative conclusions based entirely on opinion evidence, none of which related to the economic effect of the plan on employment, production, or the existence of monopoly control. The records in the other important cases before the Supreme Court were just as poverty-stricken except in F.T.C. v. Curtis Publishing Company where 2,600 pages of testimony were taken relating to the operation of the company's merchandising plan and to its erection of a vast employment system at a cost of over $5,500,000. In this case the Commission's finding that the plan was an unfair method of competition was rejected. (See digest of case in Section II, page 13 et seq.)

Restraint of competition on products sold by the General Electric Company through the use of 21,000 so-called "agents" which has been declared legal appears to be at least as great as that resulting from the Dr. Miles' contracts. (*)

Courts and administrative bodies charged with the duty of passing on such questions, and thereby with the duty of protecting the public interest, would be in a much better position to sustain or condemn a price maintenance plan or device if they had available for their use a factual record presenting its economic effects.

The public today is just as much interested in employment problems, the ability to buy quality merchandise, and the prevention of monopoly control, as was the public of other periods. Whether a particular price maintenance plan enables a manufacturer to lessen fluctuation in employment; whether such a plan affects the quality of his product; whether price maintenance plans prevent or give rise to unfair or deceptive trade practices (such as sub-standard packaging, etc.); and whether the manufacturer occupies a monopoly position; are all questions upon which evidence could be had. Obviously, if the Court had before it ample information of this character, it would be in a much better position to determine whether or not a particular price maintenance device did or did not unduly restrain trade. Thus the doctrine of past decisions, that resale price contracts are bad per se, may not stand inflexibly as precedents for future cases if the Court has before it factual data proving that a given system of such contracts are reasonable and not inimical to the public interest, using as a method for measuring the ingredients of the public interest a modern manifestation of the older principles.

(*) These cases are discussed hereafter and also in Section II, page et seq.

SECTION II CLASSIFICATION OF IMPORTANT RESALE PRICE MAINTENANCE DECISIONS INTO RELATED GROUPS

I. DECISIONS BY FEDERAL COURTS:

A. Decisions concerning Patented Articles.

The early cases regarded a price maintenance provision in a patent license agreement as subject to the patent statute. Hence a violation of such a provision was construed to be an infringement of patent rights; but this rule was changed by later decisions. The cases discussed hereafter show how this change was made.

HEATON BUTTON FASTENER CO. v. EUREKA SPECIALTY CO.
77 F. R. 288 (1896)

In this case the complainant was the holder by assignment of patents covering machines for fastening buttons on shoes. It had a virtual monopoly in this field. The machines were made specifically to be used with a certain type of staple manufactured by the same company and they also bore on a metallic plate the inscription:

> "This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company to whom title to said machine immediately reverts upon violation of the contract of sale."

The Court decided that the above condition was a reasonable exercise of the rights enjoyed by a patentee having exclusive monopoly rights in his invention. In this regard the Court said:

> "The patentee, if he see fit, may reserve to himself the exclusive use of his invention discovery. If he will neither use his device, nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use, or permit others to avail themselves of it upon reasonable terms is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can but endure for the life of the patent and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property, that he is neither bound to use the discovery himself, nor permit others to use it."

This case is commonly referred to as the Button Fastener case, and is the origin of the principle that a patentee, by notice, can validly prohibit buyers of his machine from using with the machine any unpatented supplies except those made by the patentee. The Court in the

text of its opinion speaks of the "novel restrictions" and says that it is called upon "to mark another boundary line around the patentee's monopoly which will debar him from engrossing the market for an article not the subject of the patent." This, as we have seen, it declined to do.

The reasoning by the Court in this case was upheld by the Supreme Court in Henry v. Dick Co. 224 U. S. 1, (1912). In this case the A. B. Dick Company of Chicago, manufacturers of a rotary mimeograph, sold one of their machines to a Miss Skou. Upon the machine appeared the following inscription:

> "License Restrictions.
> This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil paper, ink and other supplies made by the A. B. Dick Co., Chicago, Ill."

The defendant, Henry, sold to Miss Skou, a can of ink suitable for use upon the mimeograph with knowledge of the license agreement set forth above and with the expectation that it would be used in connection with the Dick Company mimeograph. The ink in question was not covered by the mimeograph patent. The Dick Company brought suit alleging that the use of this ink with their patented mimeograph was an infringement of the patent rights. The Court finding for the complainant held that the statutory rights of the patentee, to make, use and sell the article containing or embodying his invention gave him a lawful right to restrict others from the manufacture, use and sale of the article. These restrictions were regarded in the nature of a conditional sale, the purchaser buying the goods with knowledge of the restrictions. However, the Court did hold that wherever the restrictions were not mentioned in the sale the patentee had no rights with respect to the future disposition of the goods. In this connection the Court said:

> "An absolute and unconditional sale operates to pass the patented thing outside the boundaries of the patent, because such a sale implies that the patentee consents that the purchaser may use the machine so long as its identity is preserved. This implication arises, first, because a sale without reservation of a machine whose value consists in its use, for a consideration, carries with it the presumption that the right to use the particular machine is to pass with it."

With regard to the conditions which may lawfully be imposed upon the purchaser, the Court said:

> "To begin with, the purchaser must have notice that he buys with only a qualified right of use."

While this case does not specifically concern price maintenance, the Court in reaching its conclusion used the identical reasoning of the Court in the Dutton Fastener case and that used in a whole series

of cases previously decided by inferior federal courts. (*)

The following are digests of the important early decisions involving similar questions:

EDISON PHONOGRAPH CO. v. KAUFMAN
105 F. 960 (C.C.W.D. Pa. 1901)

The court issued a preliminary injunction against a price cutter as a patent infringer; the complainant required its jobbers to agree to maintain resale prices; defendant was not a party to such an agreement but bought with notice that such restrictions were imposed. (**)

BEMENT v. NATIONAL HARROW COMPANY
186 U. S. 70 (1920)

The plaintiff was the owner by assignment and purchase of a large number of United States letters patent covering inventions embodied in the "float spring tooth harrow." By special contracts based on valid considerations, the National Harrow Co. granted to the Bement Co., the license and privilege of using the rights under those patents in its business of manufacturing, marketing and bending to others to be used, float spring tooth harrows and attachments. In the agreement between the two companies it was specified that Bement should allow no rebate or reduction from the price or prices fixed in the license. When the articles of contract were broken by Bement, the National Harrow Company

---

(*) Tub. Rivet & Stud Co. v. O'Brien, 93 F. (C.C.D.Mass, 1898)
Rupp & Wittenfeld v. Elliott, 131 F. 730 (C.C.A.6th, 1904)
Leeds & Catlin Co. v. Victor Talking Machine Co. 154 F. 58 (C.C.A.2, 1907)
Aeolian Co. v. Juelg Co. 155 F. 119 (C.C.A.2nd 1907)
A. B. Dick Co. v. Milwaukee Office Specialty Co. 168 F. 930 (C.C.E.D.N.Y. 1908)
Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. 172 F. 225 (C.C.E.D.N.Y. 1909)
Crown Cork & Seal Co. v. Std. Brewery, 174 F. 252 (C.C.N.D.Ill. 1906)
Commercial Acetylene Co. v. Autolux Co. 181 F. 387 (C.C.E.D. Wis. 1910)
Other inferior federal courts rejected this rule in the following cases:
Cortelyou v. Johnson & Co. 145 F. 933 (C.C.A. 2d, 1906) reversing 138 F. 110 (S.D.N.Y. 1905)
Individual Drinking Cup Co. v. Errett, 297 F. 733, 727-8 (C.C.A. 2d, 1924).

(**) Accord. (Notice affixed to chattel). Edison Phonograph Co. v. Pike 116 F. 863 (C.C.D. Mass. 1902); Victor Talking Machine Co. v. Fair 122 F. 424 (C.C.A. 7th 1903); Winchester Repeating Arms Co. Olmstead, 203 F. 493 (C.C.A. 7th 1913).

brought suit, and the case (*) finally reached the United States Supreme Court. The defendants maintained that the contracts with plaintiff were illegal because against public policy and contrary to the spirit and letter of the Sherman Law.

In a decision favorable to the plaintiff, the Court developed the following argument.

> "...the general rule is absolute freedom in the use or sale of rights under the patent laws of the U. S. The very object of these laws is monopoly and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, will be upheld by the courts. The facts that the conditions in the contract keep up the monopoly or fix prices does not render them illegal."

The Court admitted that the contracts were in restraint of trade and commerce between the states, but held that such restraint is not in violation of the Sherman Law, because it arises from reasonable and legal conditions imposed by the owner of a patent. The Court further admitted that the contract resulted in keeping up the prices of the commodities, but "this the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and he may assign it or sell the right to manufacture and sell the article patented, upon the condition that the assignee shall charge a certain amount for such articles." (**)

(*) The complainant was beaten in the Circuit Court of Appeals when it brought suit against two of its licenses, the Court holding that the license agreements were illegal. See National Harrow Co. v. Hench 83 F. 36 (C.C.A. 2nd, 1897) affirming 76 Fed. 667. The plaintiff sued the licensee as an infringer but without success. National Harrow v. Hench, 84 F. 226 (C.C.N.D.N.Y. 1898). Another member of the combination was permitted to rescind his entry into the trust on the ground that it was an illegal combination. Straight v. National Harrow Co. 18 N.Y.S. 224 (1891) But after withdrawal he became a stranger and could not enjoin an infringement suit. Straight v. National Harrow Co. 51 F. 819 (C.C.D.N.D. N.Y.) and although a stranger, defendant prevailed in the District Court of Indiana on the ground that the Court could not aid an illegal trust. National Harrow Co. v. Quick, 67 F. 130 (C.C.D. Ind. 1895) The Circuit Court of Appeals is not prepared to subscribe to that doctrine by affirming the judgment on the ground that the patent in suit was void. 74 F. 236 (C.C.A.7, 1896).

(**) The Court seemed to emphasize the fact that it did not appear from the record that the license agreement sued on was a mere part of a general scheme for the elimination of competition between competitors. This case was at the time it was rendered, commonly regarded as making the Sherman Act ineffective in combinations where patents were involved.

NATIONAL PHONOGRAPH CO. v. SCHLEGAL
128 F. 733 (C.C.A. 8th, 1904)

The complainant was the exclusive licensee for the sale of Edison phonographs and records. In 1901 it entered into a contract in writing called "jobber's agreement" with the defendants. The terms of the contract in the main were: (1) to sell only at certain named prices; (2) to sell only to retail dealers who signed a prescribed and similar agreement governing and controlling sales by retail dealers; and (3) to sell all Edison phonographs and records under the condition that the license to use and vend them implied from such sale was dependent upon the vendee's compliance with the foregoing conditions. Upon the breach of any of them, the license to use or vend the said phonographs or records immediately ceased and any vendor or user thereafter became an infringer of said patent and could be proceeded against by suit for injunction or damages. Although the defendants consented to a decree against them, the lower court refused to enter it on the ground that the contract was against public policy but the Circuit Court of Appeals in reviewing the lower Court's decision held the resale contract price enforceable and said:

> "In this case the exclusive right to sell has been transferred to complainant, and to that extent it has and controls the monopoly granted by the letters patent. An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits and, as against all who have notice of the restriction is subject to the control of whoever retains the monopoly. * * *
>
> "The condition against sales to retail dealers who do not sign a similar agreement governing sales by them was imposed by complainant in the legitimate exercise of its property right in the monopoly, and for the purpose of rendering it valuable. The complainant had the same right to require that such an agreement be exacted from defendants' vendees that it had to demand it from defendants. Any sale by defendants outside of the terms of their under-license or contract was an invasion of complainant's lawful monopoly.
>
> "The contract which the parties had made, and which defendants were violating, was a valid one."* * *

N. J. PATENT CO. v. SCHAFFER
159 F. 171 (C.C.E.D. Pa. 1908)

A stranger procured a confederate to become a licensed dealer and get goods for him to sell at cut prices; this conduct was enjoined as an infringement.

THE FAIR v. DOVER MANUFACTURING COMPANY
166 F. 117 (C.C.A.7th 1908)

Sales to dealers were conditional on maintaining prices. A stranger with actual notice of the condition is enjoinable. A notice affixed to the chattel is immaterial.

THOMAS A. EDISON INC. v. SMITH MERCANTILE COMPANY
188 F. 925 (C.C.W.D. Mich. 1911)

Goods were first sold to dealers with resale price maintenance contracts. Defendant bought from a salvage company who had bought at a fire sale. Held plaintiff's right to an injunction depends upon establishing its patent. The court remarked that the Dr. Miles case and Bobbs-Merrill Publishing Co. v. Straus, "have tended to indicate that some limits will be placed upon the now customary practice." But it was still thought that the last mentioned cases did not apply to patented articles. See Automatic Pencil Sharpener Co. v. Goldsmith Bros. 190 F. 205 (C.C.S.D.N.Y. 1911); Motion Picture Patents Co. v. Universal Film Manufacturing Co. et. al., 243 U. S. 502, (1917). It was not until the so-called Motion Picture Patents case that this practice was held invalid. (Motion Picture Corporation Co. v. Universal Film Mfg. Co. 243 U. S. 502 (1917).

In this case the Motion Picture Patent Company was the assignee of a patent granted in 1902 for improvements in projecting kinetoscopes, and in accordance with its rights as assignee had by a "license agreement" granted to the Precision Machine Company the right and license to manufacture and sell machines embodying the invention described in the patent. In this agreement the Precision Machine Company agreed to sell its machines only on condition that they be used "solely for exhibiting or projecting motion pictures containing the invention....leased by a license of the licensor while it owns said patents and upon other terms to be fixed by the licensor and complied with by the user while the said machine is in use and while the licensor owns said patents."

Another condition agreed to by the Precision Machine Company was to affix to every machine sold the following Notice:

"Serial No. _____

Patented.

The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent number _____ leased by a licensee of the Motion Picture Patents Co., the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Co. and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The agreement further provided that the Precision Machine Company should not sell any machine at less than the list price fixed by the Motion Picture Patent Co. except to jobbers and others for the purpose of resale and that it would require such jobber and others to sell at not less than the stipulated list price.

In compliance with the terms expressed in the agreement the Precision Company sold to the 72nd Street Amusement Company a machine bearing the license notice quoted above. Soon after the patent referred to in the notice and which affected only the films being used in the machine expired, and somewhat later the playhouse with the machine was leased to the Prague Amusement Company, which proceeded to use in the leased machine unpatented films acquired indirectly from the Universal Film Manufacturing Company. The Motion Picture Patent Company notified the Prague Amusement Company that its use of the leased machine without license constituted an infringement of the patent and on the same day notice was also sent to the Universal Film Manufacturing Company charging infringement of the same patent by supplying films for use upon the machine in question. Suit was brought and the court was squarely confronted with the question of whether or not a patentee or his assignee may license another to manufacture and sell a patented machine and by notice attached to the machine restrict the use by the purchaser to films which are not covered by the patented machine and are not patented. Also whether or not the assignee of a patent which has licensed another to make and sell the machine covered by it can by notice attached to said machine limit the use of it by the purchaser or by the purchasers, to terms which do not appear on the notice but which are to be fixed after sale by such assignee in its discretion. With respect to those questions the Court said:

> "The exclusive right to vend a patented article is derived from the same clause of the section of the statute which gives the exclusive right to 'use' such an article, and following the decision of the Button Fastener case, it was widely contended as obviously sound that the right existed in the owner of a patent to fix a price at which the patented article might be sold and resold under penalty of patent infringement. But this Court in Bauer v. O'Donnell...refused to give such a construction to the Act of Congress and decided that the owner of a patent is not authorized by either the letter or the purpose of the law to fix, by notice, the price at which a patented article must be sold after the first sale of it, declaring that the right to vend is exhausted by a single unconditional sale, the article sold being thereby carried outside the monopoly of the patent law, and rendered free of every restriction which the vendor may attempt to put upon it. The statutory authority to grant the exclusive right to 'use' a patented machine is not greater, indeed is precisely the same, as the authority to grant the exclusive right to 'vend' and, looking to that authority for the reasons stated in this opinion we are convinced that the exclusive right granted in every patent must be limited to the invention described in the claims of the

patent and that it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are not part of the patented invention, or to send its machines forth into the channels of trade of the country subject to conditions as to use or royalty to be imposed thereafter at the discretion of such patent owner. The patent law furnishes no warrant for such a practice and cost, inconvenience and annoyance to the public, which the opposite conclusion would occasion forbid it.

"It is argued as a merit of this system of sale under a license notice that the public is benefitted by the rule of the machine at what is practically its cost, and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation, of the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention upon which the law gives it a monopoly, but from the unpatented supplies with which it is used and which are wholly without the scope of a patent monopoly, thus in effect extending the power to the owner of the patent to fix a price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.

"We are confirmed in the conclusion which we are announcing by the fact that since the decision of Henry v. Dick Co. 234 U. S. I. the Congress of the U. S., the source of all rights under patents, as if in response to this decision has enacted a law making it unlawful for any person engaged in interstate commerce 'to lease or make a sale or contract for the sale of goods...machinery, supplies, or other commodities whether patented or unpatented for use, consumption or resale ...or to fix a price charged therefor....on the condition, agreement or understanding that the lessee or purchaser thereof shall not use...the goods...machinery, supplies or other commodities of a competitor or competitors of the lessor or seller where the effect of that lease, sale or contract for resale, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' (28 Stat. at Large p. 730).

"Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us.

"It is obvious that the conclusions arrived at in this opinion are such that the decision in Henry v. Dick Co. 234 U. S. I, must be regarded as overruled."

The Court criticised the reasoning expressed in the decisions upholding the right of a patentee to impose restrictive agreements in the following language:

"The defect in this thinking springs from the substituting of inference and argument from the language of the statutes and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general, as distinguished from those of the patent law. While it is true that under the statutes as they were (and now are) a patentee might withhold his patented machines from public use, yet if he consented to use it himself or through others, such use immediately fell within the terms of the statute and, as we have seen, he is thereby restricted to the use of the invention as it is described in the claims of his patent and not as it may be expended by limitations as to materials and supplies necessary to the operation of it imposed by mere notice to the public." (*)

Digests of important Supreme Court decisions involving price maintenance in connection with patented articles since the Motion Picture Patents case are set forth below in chronological order:

BOSTON STORE v. AMERICAN GRAPHAPHONE CO.
246 U. S. 8, (1, 16)

The Graphaphone Company manufactured a patented article, and required from distributors contracts to maintain resale prices. It brought a suit to enjoin violations of the contract by defendant, a distributor. Chief Justice White, speaking for the Court said at page 25:

"Applying the cases thus reviewed there can be no doubt that the alleged price-fixing contract disclosed in the certificate was contrary to the general law and void. There can be

---

(*) The Motion Picture Patent Case was decided in 1917. In 1920 the District Court of Delaware in Coco Cola Bottling Co. v. Coco Cola Company, 269 Fed. 769, issued a temporary injunction forbidding the breach of an agreement where a syrup company gave the complainant the exclusive right to bottle the syrup with carbonated water and sell the product in an exclusive territory notwithstanding the defense that the agreement was illegal.

equally no doubt that the power to make it in derogation of the general law was not within the monopoly conferred by the patent law, and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred." (*)

UNITED STATES v. A SCHRADER'S SON, INC.
252 U. S. 85 (1920)

This case involved an indictment under the Sherman Act, which alleged the execution of actual contracts for price maintenance. The Court, through Justice McReynolds, explained that the Colgate Case was not intended to overrule the Dr. Miles Medicine Case, and said at p. 99:

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them and one where he enters into agreements - whether express or implied from a course of dealing or other circumstances - with all customers throughout the different states, which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the states. (**)

(*) "Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely, it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles." Per J. Brandies dissenting in Boston Store v. Am. Graph. Co.

(**) The indictment in this case alleged that defendant sold patented automobile tire valves and accessories to tire manufacturers and jobbers upon uniform contracts whereby purchasers promised to maintain separate specified schedules of prices on resales to other jobbers, retailers and consumers. The judge of the federal district court, (264 F. 175, 179-186, 1919) sustained a demurrer to the indictment because it failed to allege any purpose to monopolize. He rejected an argument that the Dr. Miles and Colgate cases were to be reconciled by reason of any distinction between formal and informal contracts, and came to the conclusion that attempt to monopolize was an essential element of the crime alleged. From the transcript of Record before the Supreme Court it appears that prices to manufacturers, jobbers and retailers, respectively, averaged about 40%, 50% and 65% of prices to consumers. See U. S. S. Ct. Oct. Term 1919, No. 567, Indictment, Exh. A. Transcript of Record. 6.

U. S. v. GENERAL ELECTRIC COMPANY, et al
272 U. S. 476; 47 S. Ct. 192 (1926).

In this case the Supreme Court refused to find a violation of the Anti-Trust Act in the price maintenance scheme of the General Electric Company, which distributed its patented articles through 21,000 agents. The holding of the Court appears at page 488:

> "We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however, comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer." (*)

B. Decisions concerning Proprietary Medicine and so-called Secret Process Goods:

Until the Supreme Court decided the Dr. Miles v. Park case (discussed hereafter), price maintenance plans in which title to articles under this classification passed from maker to wholesaler and then from wholesaler to purchaser were repeatedly recognized and protected (by inferior federal courts) upon the ground of direct analogy between the rights and monopolies of patent and trade secret articles:

> Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 798
> Dr. Miles Medical Co. v. Jayne, 145 F. R. 338
> Hartman v. Park, 145 Fed. 358
> Dr. Miles Medical Co. v. Platt 142 Fed. 606
> Park v. Bruen, 152 F. R. 690
> Hartman v. Platt, 142 Fed. 606
> World's Dispensary Medical Association v. Platt, 142 Fed. 606
> In Re Park, 138 Fed. 421
> Wells & Richardson Co. v. Abraham, 146 Fed. 190
> Jayne v. Loder (C.C.A. 3rd Ct.) 149 F. R. 21 (**)

(*) "The question of the nature of the contract between plaintiff and its dealers, whether one of absolute or conditional sales of automobiles, lies at the threshold of the controversy". For a discussion of the cases involving contract of sale and agency see Ford Motor Co. v. Union Motor Sales Co., 244 Fed. 156 (C.C.A.6,1917) affirming 235 Fed. 573 (S.D.Ohio 1914). But cf. Curtis Publishing Co. v. F. T. C. 260 U. S. 568 (1923). For a discussion of this problem, with particular reference to the principal case from the point of view of marketing, credit burdening, etc., see 27 Columbia Law Review 567 (1928).

(**) The Court dissolved the Tripartite agreement, ruling that a vertical price maintenance agreement was illegal.

It should be noted from the above list that these include three cases in which the Dr. Miles Medical Co. was the plaintiff.

Dr. Miles Medical Co. v. Goldthwaite: this case should have been regarded as rather weak and unauthoritative because the decree was not resisted.

Dr. Miles Medical Co. v. Jayne was decided by the same Judge as decided the Goldthwaite case, which probably lessened its effect as an authoritative precedent, and

Dr. Miles Medical Co. v. Platt. This case was followed by Wells & R. Richardson v. Abraham in which the legality of the contracts was not denied by the defendant, thus lessening the value of the opinion as a basis for the legality of price maintenance contracts. The ground upon which the two above cited contested cases relied wasthe identity between the rights of a patentee and those of the owner of a trade secret or private formula with respect to the product or manufactured article.

In Dr. Miles Medical Co. v. Jayne cited above the court said:

"The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this they do not rely so much upon the common law rule as upon the Federal Statute (26 Stat. 209) (this statute relates to patents). The bill alleges that the complainant is the exclusive owner of these secret formulae and the exclusive manufacturer of these remedies. It follows that until voluntary disclosure or lawful discovery the complainant has an exclusive right of property in these trade secrets and has the right to make, use and sell the articles patented thereunder. Exclusive right of property in a trade secret is of necessity a monopoly the same as a patent or copyright. The complainant may make these articles or refrain from making them. It may sell them to one person and not to another at such prices and under such conditions as it may deem advantageous. Contracts like those set out in the bill concerned articles made under trade secrets, the same as similar contracts concerning articles made under a patent or copyright, are outside the rule of restraint of trade whether at common law or under the federal statute." (Numerous cases cited.)

In Dr. Miles v. Platt the Judge said:

"These suits are brought for an infringement or violation of the property right of the complainants in the secret process owned or controlled by them. The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion. The holder of such a property right is said by the court in the Victor Talking Machine cases....a czar in his own domain. He may sell, or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person and another to another person, he isnot required to give reasons or deal fairly with purchasers. Why is it material then, in a suit to prevent infringement of complainants' rights in the secret process, to inquire whether complainants have entered into a combination or conspiracy to control everything they are lawfully entitled to control?"

In Jayne v. Loder, an action was brought under Section 7 of the Sherman Act against a combination of three large associations; that of the wholesale druggists; that of retail druggists and the Association of Manufacturers of Proprietary Medicines. The object of the combination was to exclude from trading in proprietary medicines every dealer who would not consent to sell to members of the combine only, and at prices named by it.

The Court among other things stated:

> "It is true, as claimed by the defendants, that any proprietor of a patent medicine or goods such as those involved in this suit, has a right to sell them to whomsoever he may see fit, and he may lawfully say who shall handle his goods at wholesale and upon what conditions the wholesaler may dispose of them to the retailer, and prescribe the condition upon which the retailer shall sell them to the consumer and in case of any violation of his agreement by either the wholesaler or retailer the proprietor has a lawful right to refuse to sell his goods in the future to either. And so the wholesaler has the right to purchase or refuse to purchase, goods from a proprietor, or to sell, or refuse to sell to a retailer and the wholesaler or proprietor has a lawful right to refuse to sell to a retailer whom he finds is cutting the price below what either of them contracted with the retailer to sell the goods."

This case was appealed and in passing on the various questions the Circuit Court of Appeals (Jayne v. Loder, 149 F. R. 21) after stating the conditions and arguments on behalf of both parties said:

> "Undoubtedly the originator and compounder of a proprietary medicine may choose his own policy and sell or withhold from selling as he pleases according to supposed self-interest, fixing the prices and naming the terms and conditions at and upon which alone he will do so, refusing to those who will not comply. And so far as this is confined to his own goods, and pursued by independent and individual action it cannot be challenged."

But this reasoning which was urged upon the Circuit Court of Appeals (6th Circuit) in Park v. Hartman, 153 F. R. 24, was rejected and Judge Lurton in his opinion stated:

> "If we are right in our conclusion that the manufactured product of a trade secret or private formula is not immune from the common law rules forbidding monopolies and unreasonable restraints of trade, the cases above referred to must be disapproved, at least insofar as they are grounded upon the cases which deal with articles made under patents or copyrights." (*)

(*) Footnote continued on next page.

This brings usup to the leading case on the subject of price maintenance.

DR. MILES MEDICAL CO. v. JOHN PARKS CO.
220 U. S. 373; 31 S. ct. 373 (1911)

The petitioner, a manufacturer or medicines prepared by secret formulae, required every wholesaler and retailer through whom its products were distributed to sign agreements to sell at prices specified by the manufacturer, Defendant, a wholesaler dealing in drugs, secured a supply of petitioner's medicines through wholesalers at prices which violated the agreement exacted by petitioner, and sold the medicines at similar "cut prices". Petitioner sought to enjoin the defendant from inducing the former's distributors to violate their contracts and from selling its medicines at less than the established resale prices. The Supreme Court refused the injunction, on the ground that the policy pursued by the pettioner was in violation of the Sherman Act, Mr. Justice Hughes, speaking for the Court said at pp. 408-409:

> "If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other.***
>
> "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. **

(*) Footnote from preceding page.

Judge Lurton's reasoning in this case was accepted in toto by the Supreme Court in Dr. Miles Medical Company case which was handed down soon afterwards. (See discussion of this case hereinafter.) "The mere fact that one article or class of articles is made under an unknown or private formula and another class is not, is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraint of trade." A close examination of the transcript of record that was submitted to the Supreme Court in the Dr. Miles case indicates that the factual data submitted to the court is confined exclusively to a discussion of the right flowing from trade secrets and whether or not the price maintenance arrangement involved an agency or contract of sale. In other words, there was absolutely no economic data in the record which would "afford an economic reason" and give the court the basis for saying that it (the plan) "operates to exempt such articles from rules against unlawful restraints of trade.

"*** The complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." (*)

BAUER v. O'DONNELL
229 U. S. 1 (1913)

The plaintiff was sole agent and licensee for the sale of Sanatogen in the United States by virtue of a contract with Bauer & Cie, of Berlin, Germany, the holders of the United States letters patent upon Sanatogen. On the original Sanatogen packages as sold by the Bauer Chemical Company was the following inscription:

"Notice to the Retailer
This size package of Sanatogen is licensed by us for sale and use at a price of not less than one dollar, Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injuction and damages."

A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation.
THE BAUER CHEMICAL CO."

O'Donnell, the proprietor of a retail drug store in the City of Washington ignored the stipulations of this notice and sold at a cut price. The ensuing suit was one of very great interest, for upon its result depended apparently the last hope of manufacturers to control resale prices through patent rights. The plaintiffs were aided in their struggle by special counsel on behalf of the Gillette Safety Razor Company and the Victor Talking Machine Company who filed briefs in their support.

The Court based its opinion in the form of an answer to this formal question: "May a patentee by notice limit the price at which future retail sales of the patented articles may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?"

No question exactly similar to this had before been presented to the Supreme Court.

The chief reliance of the plaintiff in this case was upon the decision in the Dick case. The restriction that was sustained in that case, however, was one arising solely from the right to use, and it served to qualify in that case the title to the mimeographs, giving a right to use the machine only with certain specified supplies.

(*) In addition to the cases set forth above this case overruled Authors & Newspaper Association v. O'Gorman, 147 Fed. 616 (D.R.F. 1906) and cf. Straus v. American Publishing Association. 177 N.Y. 474; 69 N.E. 1107 (1904); Park & Sons Co. v. Nat. Wholesale Druggist Association 175 N.Y. 1; 67 N.E. 136 (1903).

Now in the Sanatogen case the plaintiffs attempted to qualify the title by granting a right to use only under specified conditions, namely, the maintenance of the price at one dollar. The Court held this a mere play upon words.

> "It is contended by argument that the notice in the case deals with the use of the invention, because the notice states that the package is licensed 'for sale and use at a price of not less than one dollar,' that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in event of the violation of restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellees. The patentee had no interest in the proceeds of the subsequent sales, had no right to any royalty thereon, or to participating in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only as was shown in the Dick case. There was no transfer of a limited right to use this invention and to call the sale a license to use is a mere play upon words."

The powers granted under the right to use clause of the patent statute being manifestly insufficient to support the contention of the plaintiff, the question arose, did the right to vend as granted by the patent statute afford support to the contention? The Court held that it did not,, stating that, "upon such facts as are now presented we think the right to vend secured in the patent statute is not distinguishable from the right of vending given in the copyright act", and that accordingly the right to vend having been exercised by the plaintiffs in their sales to the jobbers, it could not be further extended to cover subsequent sales. In conclusion, the Court summed up as follows:

> "The patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee."

C. Decisions Concerning Trade-marked and Copyrighted Articles.

BOBBS-MERRILL v. STRAUS
210 U. S. 339

The court held that the owner of a copyright did not have the right to fix the resale price of copyrighted books and rejected the argument that price maintenance contract rights arising under a copyright were similar to those incidental to patent ownership. (*)

In this connection the Court said (page 351).

> "The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to correct the title of a future purchase by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless purchased at the price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail prices, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation by construction, beyond its meaning, when interpreted with a view to ascertaining intent in its enactment."

D. Decisions Concerning Other Identified Products.

U. S. v. COLGATE & CO.
250 U. S. 300; 395 S. Ct. 465 (1919)

This is one of the landmarks on the law of price maintenance. This case arose on an indictment for violation of the Sherman Act. The indictment, as construed by the District Court, did not allege that defendant had made contracts with its distributors but that it had merely indicated the prices at which it wished its products to be sold, and refused to sell to those distributors who did not charge such prices until they gave assurances of compliance with defendent's policy. The Supreme Court accepted this construction as conclusive and distinguished the Dr. Miles case on the ground that in the case under adjudication the manufacturer had made no contracts for price maintenance, and said at p. 307:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long

---

(*) Accord. Scribner v. Straus, 210 U. S. 352 (1910)
Overruling Authors' and Newspaper Association v. O'Gorman, 147 Fed. 616 (1906)

> recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. * * * (*)

FREY & SON v. CUDAHY PACKING CO.
256 U. S. 408; 41 S. Ct. 451 (1921)

The plaintiff, in 1917, recovered a judgment under Section 7 of the Sherman Act for damages suffered as a result of a combination between the defendant and its jobber to maintain resale prices. This decision was reversed by the Circuit Court of Appeals in July, 1919. A majority decision of the Supreme Court affirmed the judgment of the Circuit Court of Appeals on the ground that the trial Judge had charged the jury that if the great majority of jobbers actually cooperated in the plan between themselves selling at the prices named, the jury might reasonably find an agreement or combination forbidden by the Anti Trust Act. The Court referred to the Colgate and Schrader cases, stating,

> "Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances."

But the Court went on to hold that the facts brought in this case standing alone would not suffice to establish such an agreement or

---

(*) In the body of the Beech-Nut case (F.T.C. v. Beech-Nut Packing Co., infra) the Court made the following statement: "In referring to the Colgate Case we said: 'The Court below misapprehended the meaning and effect of the opinion and judgement in that cause'". There appears no evidence that any other court apprehended the Colgate case before these explanations were made by the Supreme Court. The District Judge's instructions on the second indictment filed in the Colgate case seem unintelligible, possibly the Court was puzzled by the appearance for the defendant of Mr. Hughes who wrote the opinion in the Dr. Miles case. The second indictment expressly named two firms and one corporation who, as dealers, agreed in Petersburg, Virginia, on or about Feb. 6, or 7, 1917, to resell the defendant's products at the prices fixed by it. The demurrer was expressly overruled as to the form of the indictment and sustained as to the substance thereof "for the reason stated" in the Judge's opinion on the first indictment. The crucial reason given in the former opinion apparently was that there was no averment of any such agreement. See U. S. S. Ct. Oct. Term, 1918, #828, Transcript of Record 5,12, 15 to 17, 21, 24. Also see C. W. Dunn, 32 Yale Law Journal at 687 & 688 (1923)

combination. (*)

E. Federal Trade Commission Decisions.

F. T. C. v. BEECH-NUT PACKING CO.
257 U. S. 441; 42 S. Ct. 150 (1922)

This was the first case to come before the Court in which resale price maintenance was alleged to be an unfair method of competition within the Federal Trade Commission Act. The Beech-Nut Company did not make formal contracts with its distributors. It announced, however, that it would refuse to sell to any dealer who failed to maintain priced indicated by the company. It urged dealers to report cases of violation, and instructed its salesmen to the same effect. The company maintained lists of "undesirable" dealers, who had been reported as selling below the indicated prices, and removed the names from the list only when the dealer gave "satisfactory assurances" that it would comply with the company's wishes. In order to enforce its policy the company employed a system of symbols or key numbers by which any package sold at cut prices could be traced to the offender. The Court found that the activities pursued by the Beech-Nut Company amounted to a violation of the Sherman Act, since the elaborate methods were equivalent to "agreements express or implied". Mr. Justice Day, speaking for the Court said at pp. 454-455:

> "* * * The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the Colgate Case was held to be within the legal right of the producer.
>
> "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti trust acts to maintain. In its practical

---

(*) The decision of the District Court in this case was between the Dr. Miles and Colgate decisions in the Supreme Court, (1917). The decision by the Circuit Court of Appeals was between the Colgate and Schrader decisions in the Supreme Court (1919). The Supreme Court opinion (citation above) does not explain how or where this reference of fact was held improper for the consideration of the Jury in the Colgate case. Justices Pitney, Day and Clark, who dissented in this case did so not only on the ground that the charge to the jury was proper but also because no proper exception was taken to said charge so that the Judge might have an opportunity to correct his mistake, if any. Nor does it appear from the brief of the Packing Company that they found fault with the charge. Voluntary trying of the case for the defense by the Supreme Court is very difficult to explain, except that, of the six Judges for the majority, four were definitely opposed to the prevailing law of resale price maintenance as evidenced by their dissent in the Beech-Nut case.

operation it necessarily constrains the trade if they would have the products of the Beech-Nut Company to maintain the prices 'suggested' by it. * * *"

"Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements expressed or implied intended to accomplish the same purpose. * * *"

The Court declared, however, that the order of the Commission forbidding any form of price maintenance was too broad. It directed that the company be enjoined from its policy of price maintenance (1) by the practice of reporting the names of recalcitrant dealers; (2) by enrolling dealers on "undesirable" lists until assurances were given to maintain the designated price; (3) by employing salesmen to report such undesirable dealers; (4) by utilizing numbers and symbols in order to detect offenders; (5) "by utilizing any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company".

The Court distinguished between the relative position of price maintenance cases coming under the Sherman Act and the Federal Trade commission Act in the statement quoted below:

"* * * it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the price which he fixes for their resale. He may not consistently with the Act, go beyond exercise of this right and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."

"The Sherman Act is not involved here except insofar as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress. The case now before us was begun under the Federal Trade Commission Act which was intended to supplement previous anti-trust leglislation * * *That act declares unlawful unfair methods of competition and gives the Commission authority after hearing, to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition announced by the Act, is left without specific definition. Congress deemed it better to leave the subject without precise definition and to have each case determined upon its own facts owing to the mul-

> tifarious means by which it sought to effectuate such schemes. The Commission in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the Act."(*)

Systems similar to the Beech-Nut Plan were involved in the cases appearing hereafter.

MILLS BROS. v. F. T. C.
9 Fed. (2d) 481 (C. C. A. 9, 1936).

The Company encouraged its customers to report instances of price cutting and instructed its salesmen to do likewise; it maintained a "do not sell" list; it attempted to exact from price cutters pledges of future adherence to the price plan in order to again be eligible to receive the product of the Company. In this connection the Court said:

> "This brings us to the principal contention of the petitioner, namely that it has simply fixed a minimum resale price for its coffee, and has refused to sell to dealers who will not maintain the minimum price, and that in so doing it has acted within its rights and kept within the law. If the petitioner has done nothing more than this, it will readily be conceded that the charge of unfair competition has failed .... what a person may lawfully do individually he may not always do lawfully by combination, or through cooperation with others .... it clearly appears from the testimony that the petitioner has in large measure succeeded in fixing and controlling the retail price of its coffee in interstate trade; that this result has been accomplished, not through individual effort alone, but by combination and through cooperation with its salesmen and customers, and that this latter element renders the method of competition unfair."

OPPENHEIM, OBERNDORF & CO. v F. T. C.
5 F. (2d) 574 (C. C. A. 4th 1925).

The Company manufactured underwear. It undertook to maintain the price at which jobbers would resell its product by means of "do not sell" lists, pledges, exhortations and refusal to sell. The Court upheld the Commission's action in condemning this scheme as an unfair method of competition on the authority of the Beechnut Case.

(*) The Beechnut case is not the first which gave rise to the principle that a resale price maintenance system might be a violation of the anti trust laws without any attempt to make an enforceable contract. This doctrine found origin in U. S. v. Kellogg Toasted Corn Flake Co. 222 F. 725 (E. D. Mich 1915). In that case such a system was held to be a violation of the Sherman Act. But cf. Gt. Atlantic & Pacific Tea Company v. Cream of Wheat Co. 224 Fed. 566 (S. D. N. Y. 1915)

CREAM OF WHEAT CO. v F. T. C. 14 F. (2d) 40 (C. C. A. 8th, 1926)

The Federal Trade Commission ordered the Company to cease and desist from maintaining prices by cooperative effort. The Court ordered the Company to cease soliciting information concerning who did not maintain prices, without condemning the practice of refusing to sell to those who were not maintaining resale prices where such information was obtained without solicitation. There is no finding in this case regarding a systematized "do not sell" list.(*)

J. W. Kobi v. F. T. C.
23 F. (2d) 41 (C. C. A. 2, 1927)

The Company procured written assurances from price cutters that they would adhere to stipulated resale prices. With reference thereto the Court said:

> "What was proven here established offences of agreements or understanding either in obtaining, directly or indirectly from its customers, promises or assurances that the prices fixed by the petitioner would be observed by such dealers and entering into contracts with the understanding that the petitioner's products would be resold by the dealers at prices specified or fixed by the petitioner. There was also a method employed in reporting on price cutters and a continuous request of dealers and jobbers to report competitors who did not observe the resale prices suggested by the petitioner and a threat to refuse sales to dealers so reported on. These practices were offensive to the act and warrant the order entered below." (**)

MOIR et al v. F. T. C.
12 F. (2d) 32 (C. C. A. 1, 1926).

Manufacturers of coffee required all dealers in a designated territory to sign post cards to the effect that they would maintain resale prices. These assurances were received both from wholesalers and retailers. The cease and desist order was upheld. The order included (1) entering into contracts, agreements or understandings with dealers, or any of them, that respondents' products are to be resold by such dealers at prices specified or fixed by respondents. (2) Procuring either directly or indirectly from their dealers promises or assurances that the prices fixed by respondents will be

---

(*) The court ordered a proviso to the Commission's order specifying what the Company might lawfully do to correct its resale price policy. (See page 48 of decision).

(**) See also 27 Columbia Law Review 183 (1927) and 12 Iowa Law Review 324 (1927)

observed by such dealers. (3) Requesting dealers to report names of other dealers who do not maintain respondents' resale prices, or who are suspected of not maintaining the same. (4) Seeking the co-operation of dealers in making effective their price maintenance policy, by manifesting to dealers an intention to act upon reports sent in by them of variations from the suggested prices by the elimination of the price cutter or by informing dealers that price cutters reported, who would not give assurance of adherence to the suggested resale prices, had been or would be refused further sales."

Q. R. S. MUSIC CO. v. F. T. C.
12 F. (2d) 330 (1926)

The price maintenance scheme involved formal agreements for an exclusive agency. The Commission issued, and the Court upheld, an ordersubstantially the same as the order in the Moir case discussed above.

F. T. C. v. AMERICAN TOBACCO CO.
9 F. (2d) 570 (C. C. A. 2d. 1925)

Members of a wholesale tobacco association of Philadelphia agreed with one another to maintain resale prices suggested by the American Tobacco Company on the products of that company. The association kept the company notified of price cutters and the company, upon verifying the information, refused to sell such offenders. Federal Trade Commission filed a complaint against the association and the company, the association then dissolved and an order to cease and desist was issued against the company.(*)

> "It appears that what the American Tobacco Company did, was not to enter into any price fixing agreement with any other manufacturers as to the price of its product to the wholesalers or to the retailers or to the public. It simply would not sell to any wholesaler or jobber in the Philadelphia territory if it found that he was selling to the retailers at a price less than that fixed by the Wholesale Tobacco and Cigar Dealers' Association of Philadelphia. As we understand the record, the American Tobacco Company fixed the price at which it sold its products to the wholesalers and the jobbers and did not do anything more than refuse to sell its products to any wholesaler or jobber who sold to the retail trade at a price which the Wholesalers' Association fixed as the price to be charged the retailers in order that their business as wholesalers might be carried on at a profit which would enable them to

---

(*) Judge Hand concurred only on the ground that the controversy was moot.

> continue in business. We have read this record carefully, and are constrained to hold that, in pursuing the course the American Tobacco Co. adopted we fail to discover anything 'unfair' or 'unreasonable' or in any way contrary to public policy."

The Supreme Court granted certiorari (270 U. S. 638; 46 S. Ct. 349, 1926) but later dismissed the writ (274 U. S. 543; 47 S. Ct. 663 1927) saying "the opinion of the Circuit Court of Appeals is of uncertain intendment and is not satisfactory as an exposition of the law". The ground for affirming the Circuit Court of Appeal's opinion appears from the following quotation from the opinion:

> "* * * We adhere to the usual rule of non-interference where conclusions of the Circuit Court of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below." (*)

HARRIET HUBBARD AYER, INC., v. F. T. C.
15 F. (2d) 274 (1926)

The Court held that it was not unlawful for the respondent to suggest resale prices and refuse to sell to those who did not maintain them. In this case the record did not show that the respondent conducted a campaign to seek out price cutters but acted only when such matters were brought to its attention. It further appears that the Company did not use its salesmen to investigate price cutting and acted only when information came to it from retailers who were being affected by price cutters. The instances in which salesmen urged

---

(*) When the Court granted certiorari it looked for a time as though the Circuit Court of Appeals would be reversed. Query: Suppose a manufacturer exercises his privilege of refusing to sell because under pressure from his distributors to do so. His distributors take the initiative of collecting evidence on price cutting; a real decision on this case would have been very helpful but the court seemed to intentionally duck the opportunity to deal with the problem foursquare. This case was the result of a lengthy investigation conducted by the Federal Trade Commission.

See Report of Federal Trade Commission on Prices of Tobacco Products (1932). Further discussion also appears in 24 Mich. Law Review 709 (1926).

See also Federal Trade Commission v. Raymond Bros. & Clark, 263 U. S. 55; 44 S. Ct. 162 (1924). This case emphasizes concerted action among several to constrain another as being the feature distinguishing between the permitted and the forbidden.

retailers to maintain the suggested price were few in number. There was no secrecy, subterfuge or conspiracy or cooperative effort with retailers to maintain prices (*)

TOLEDO PIPE THREADING MACHINE COMPANY V. FEDERAL TRADE COMMISSION
11 F. (2d) 337 (1926)

The Commission alleged the company was using unfair methods of competition in maintaining resale prices in the sale of tools. The company sold directly to retailers (1,000 to 1,200) and not through jobbers. The following conclusions of the commission were affirmed. 1. Requiring from dealers assurance that they will be governed by the suggested resale discounts in the disposal of stock previously purchased, as a condition precedent to subsequent sales to them by respondent. 2. Requiring from dealers placing orders assurance that the commodities so ordered will be resold at the suggested resale discounts as a condition precedent to the acceptance of such orders. 3. Requiring from dealers, generally, assurances that they will be governed by the suggested resale discounts in all resales of respondent's products, under threat of discontinuance of relations. The following was vacated. 4. Seeking the cooperation of dealers in making effective a resale price maintenance policy (1) by seeking the advice of dealers as to the location of a selling territorial division line for the stated purpose of eliminating price competition among dealers (It appears this practice had been abandoned three years before the order); (2) by manifesting to dealers an intention to act upon all reports sent in by them of variations from the r sale discounts by the elimination of the price cutter; (3) by informing dealers that price-cutters reported who would not give assurance of adherence to the suggested prices, had been or would be refused further sales; (4) by employing its salesmen to investigate charges of price cutting reported by dealers and advising dealers of that fact, by which means, aid of dealers is sought and obtained in the prevention of departures from respondent's resale discounts. (*)

SHAKESPEARE COMPANY, v. F. T. C.
15 F. (2d) 758 (1931)

In this case the Court further indicated how far manufacturers could go in pursuing a price maintenance policy. This appears from the following excerpt from the Court's decision:

> "The line of demarcation between the permissible and the prohibited, under principles already suggested, is indistinct and rather baffles definition. Perhaps it might be said that those contracts, or those cooperative efforts, which fall within the inhibition of the law, relate primarily to the fixing of prices for goods already in the hands of jobber or retailer, rather than to a refusal by the manufacturer to make further sales to those who cut prices. In this connection we are of the opinion that the petitioner, under the Commission's order, may refuse to sell to those customers who demoralize the market and may announce at its general policy an intention to do so. If some customer cuts prices below the

(*) See Comment 40 Harvard Law Review 139 (1926) Also 75 Pa. Law Review 240-255 (1927)

suggested minimum the petitioner may refuse to make additional sales to such customers,.....but may go no further. Assurances as to future conduct may not be solicited. Should such assurances be given by the customer, notwithstanding the lack of solicitation, they must be considered as gratuitous and as not involving the petitioner in a violation of the Commission's order. They would then amount to no more than persuasion on the part of the customer that the petitioner resume its former relations."

ARMAND CO. INC. v. F. T. C.

On December 11, 1935 the United States Supreme Court denied a petition for a writ of certiorari filed by the Armand Company, Inc., of Des Moines, Iowa, manufacturer of toilet articles and cosmetics.

In filing the petition the Armand Company, Inc., sought to obtain a review of the decision of the U.S.Circuit Court of Appeals for the Second Circuit (New York City), handed down on July 1 last, in which decision that Court unanimously affirmed a cease and desist order by the Federal Trade Commission directed against the maintenance by the Armand Company, Inc., through the medium of expressed or implied agreement, of resale prices for its products fixed at arbitrary levels imposed by the company.

Refusal of the Supreme Court to review the judgment of the Court of Appeals leaves the decision of the latter court as the last word in that case. In its opinion that Court said:

"It was found as a fact by the Commission that the Chief objective of petitioner's merchandising policy was the maintenance of the wholesale and retail prices suggested by the petitioner for its products, and that the direct effect of petitioner's practices had been and now is to suppress competition among wholesalers and between retail dealers engaged in the distribution and sale of petitioner's products. The further effect was the constraint imposed upon wholesale and retail dealers in selling petitioner's products at prices fixed by the petitioner, and the preventing of sale by such dealers of petitioner's products at prices which such dealers desired, thereby depriving the ultimate purchaser of petitioner's products of that advantage of price which otherwise would be theirs in a natural and unobstructed flow of commerce under free competition.

"The Commission concluded that the petitioner's practice were to the prejudice and injury of the public and constituted unfair methods of competition in commerce and a violation of Sec. 5 of the Trade Commission Act. The findings of the Commission are amply supported by the evidence. The evidence supports the finding that by agreements between petitioner and its dealers it maintained prices and prevented those who would not do so from securing petitioner's products. The Policy in question had a tendency to stifle competition and was unlawful."

FEDERAL TRADE COMMISSION v. CURTIS PUBLISHING CO.
260 U. S. 568 (1920)

The Curtis Publishing Company at great expense ($5,500,000) and

over a long period of years built up a method of distributing its magazines through school boys. It entered into contracts with its distributors who were in charge of school boys, which in substance prevented these distributors from handling the output of other publishers without prior approval. The record clearly indicated that there were other outlets available to other publishers. One part of the Commission's complaint charged the respondent with violating Section 3 of the Clayton Act by "selling and making contracts for the sale of its publications --- for use and resale and as fixing the price charged on condition -- on understanding that the purchaser shall not sell other publications --- thereby substantially lessening competition and tending to create a monopoly". The other part of the complaint charged the Curtis Publishing Company with "using unfair methods of competition contrary to Section 4" of the Federal Trade Commission Act. Said the Court with reference to the charge concerning violation of the Clayton Act:

> "We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for the court, not the Commission; and the same rule must apply when the charge is that leases, sales, agreements or understandings substantially lessen competition or tend to create monopoly. Federal Trade Commission v. Gratz, 253 U.S. 421; 427; 40 S. Ct. 572.
>
> "Manifestly, the court must inquire whether the Commission's findings are supported by evidence. If so supported, they are conclusive, but as the statute grants jurisdiction to ..... enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think should be remanded to the Commission-- the primary fact-finding-body-- with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do. The language if the statute is broad and confers power of review not found in the Interstate Commerce Act (24 Sta.379)...
>
> "The present record clearly discloses the development of respondent's business, how it originated the plan of selling through school-boys, the necessity for exclusive agents to train and superintend these boys and todevote their time and attention to promoting sales, and also contracts with 1,535 such agents. The Commission's report suggests no objection as to 1,088 of these representatives, who prior to their contracts, had not been engaged in selling and distributing newspapers or periodicals for other publishers. There is no sufficient evidence to show that respondent intended to practice unfair methods or unduly to suppress competition or to acquire monopoly, unless this reasonably may be inferred from making and enforcing the .... agreement with many important wholesale dealers throughout the country.

"Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character. This, of course, disposes of the charges under the Clayton Act."

With reference to that part of the complaint charging that this plan constitutes unfair method of competition, the Court said:

"The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably beinferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render inseparable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaints, and, when standing alone, certainly affords no ground of condemnation under the statute."

II. DECISIONS BY STATE COURTS

State courts have subsequently sought to distinguish the Dr. Miles case. In Ghiradelli Co. v. Hunsicker, 164 Cal. 355; 128 Pac. 1041 (1912) resale price maintenance on ground chocolate was upheld, the Dr. Miles and Hartman cases being explained on the ground that the proprietary medicines there in question were unique, while ground chocolate was plentiful.

FISHER FLOURING MILLS CO. v. SWANSON 76 Wash. 649; 664; 137 Pac. 164 (1913)

This is perhaps the state decision most widely cited by the proponents of price maintenance. The court advanced arguments which attacked the basis of the Dr. Miles case, but sought to explain that case as resting upon the extensive contract system covering over 25,000 dealers and involving both jobbers and retailers.

INGERSOLL v. GOLDSTEIN. 83 N. J. Eq. 445; 93 A. 193 (1915) (*)

The plaintiff lost because the statute invoked was strictly construed and the notice did not prohibit selling in violations of the statute out simply prohibited selling for less than the specified price.

The manufacturer then annexed a notice to the chattel, forbidding selling below a specified price without removing the name of the maker, the trade mark and guarantee, and refraining from using his name, good will or selling helps. An injunction was issued. Ingersoll & Bro. v. Hahne & Co. 88 N. J. Eq. 222; 101 A. 1030 (1917). Same case, 89 N. J. Eq. 332, 102 A. 128 (1918). See also New Century Manufacturing Co. v. Scheurer, 45 S. W. (2d) 560 (Tex. Com. App. 1932).

CLARK v. FRANK
17 Mo. App. 602 (1885)

A manufacturer offered a discount rebate to dealers who had maintained his announced resale prices. A dealer sued for the discount upon the theory that the condition was void as in restraint of trade. Judgment for the defendant.

WALSH v. DWIGHT
40 App. Div. 513; 58 N.Y.S. 91 (1899)

In this case such a rebate was held to be no violation of the New York Anti-Trust Law of 1893.

(*) "It shall be unlawful for any merchant, firm or corporation to appropriate for his or their own use a name, brand, trade mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale or a sale by a concern going out of business." N. J. Laws 1916 c. 107 amending L. 1913 c. 210 as amended by L. 1915 c. 376.

GARST v. HARRIS
177 Mass. 72; 58 N.E. 174 (1900)

Liquidated damages stipulated for the breach of a resale price maintenance contract were awarded to the plaintiff. In this connection, C. J. Holmes Said:

> "This is an action of contract to recover $21 as liquidated damages for breach of an agreement not be sell Phengo-Caffein below a stipulated price. Phengo-Caffein was a proprietary medicine purcased by the defendant of the plaintiff. At the time of the sale, and as a part of it, a written statement of terms, containing this agreement was read to the defendant and delivered to him. One stipulation expressed in the document was that the acceptance of the goods, with the ntoice of the conditions of sale should be an assent to the terms. The defendant accepted the goods, and expressed no dissent. There is no question, therefore, that he agreed to those terms upon the consideration of the sale, which was made with a deduction from the retail price. The defendant sold the goods so purchased below the stipulated price, and broke his contract. So much of the defendant's argument as denies the agreement, the consideration, or applicability of the contract to the goods sold, needs no further discussion.
>
> "The rest of the defense needs but a few words. It is said that the contract was unlawful, as in restraint of trade. Some limits were set to the inherited doctrine on this subject by the recent case of Electric Co. V. Hawkes, 171 Mass. 101; 50 N. E. 509; 41 L.R.A. 189, as they had been in England before. When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough." (citing cases).

COMMONWEALTH v. GRINSTEAD
111 Ky. 203; 63 S. W. 427 (1901)

Wholesale grocers, although organized into an association, had contracted individually with manufacturers of certain specialties to respect the manufacturers' named wholesale prices. In a criminal proceeding, this was held no violation of the Kentucky Anti-Trust Act.

GROGAN v. CHAFFEE
156 Cal. 611; 105 Pac. 745 (1909)

A manufacturer of olive oil enjoined, as a breach of contract, price cutting by a retailer who had bought directly from him. (*)

(*) For detailed description of importance of this case in the development of the California law on resale price maintenance see Part III, B.

DOUBLEDAY- DORAN INC. et al v. R. H. MACY et al (*)
(Decided by the N. Y. Court of Appeals, Jan. 7, 1936.)

III. ENGLISH DECISIONS

ELLIMAN, SONS & CO. v. CARRINGTON & SON, Ltd.
(1901) 2 Ch. D. 275.

A manufacturer maintained an action against a wholesaler who broke his contract with the manufacturer by failing to exact price maintenance contract from a retailer to whom the defendant had sold. One pound damages were recovered, an injunction being denied on the ground that the plaintiff had an adequate remedy for self-help in refusal to sell.

NATIONAL PHONOGRAPH CO. LTD. v. EDISON BELL, etc.
(1908) 1 Ch. D. 335.

A manufacturer obtained an injunction against a stranger who procured factors to break their contracts with the plaintiff.

IV. CANADIAN DECISIONS

Maintenance of resale prices allowing unreasonably high profit margins has been held to violate s498 of the Crim. Code. Wampole & Co. v. Karn & Co. 11 Ont. L.R. 619 (1906-86%); Stearn v.Avery. 25 Can. C. C. 339 (1915). The validity of such maintenance schemes in general has been questioned only recently. 7th Rep. of Registrat of Combines Investigation Act (1930) 11, See note 32 Columbia Law Review, 324, 329 (1932).

(*) Discussed in Part IV, Chapter I, Section IV, page 496

APPENDIX TO PART IV

The material in this Appendix pertains to Part IV - THE INTERPLAY OF INTERESTS IN THE DRUG INDUSTRY.

Federal Trade Commission Drug Industry Cases

Name	Complaint Entered	Order Issued	F. T. C. Order
Chester Kent & Co.,	12/ 6/17	4/30/18	Cease & desist
Nat'l Walsle. Drug Ass'n.	6/29/18	9/3/24	Dismissed
Eli Lilly & Co.	6/ 6/18	5/27/19	Cease & desist
Vapo-Cresoline Co.,	12/ 2/18	11/17/19	Dismissed
De Miracle Chem. Co.,	10/ 8/18	7/20/22	Dismissed
Marinello Company	10/30/18	7/20/22	Dismissed
T. M. Sayman Products Co.,	6/17/24	6/26/25	Cease & desist
Pepsodent Company	5/19/27	9/23/29	Dismissed
Herb Juice Medicine Co.,	7/16/27	4/10/28	Cease & desist
Scott & Bowne	7/20/27	7/26/28	Cease & desist
Johnson & Jonnson	11/ 6/28	6/26/29	Cease & desist
Maryland Phar. Co.,	5/ 9/29	6/27/29	Cease & desist
Coty, Inc.,	8/23/29	4/27/29	Cease & desist
Meade, Johnson Co.,	1/ 4/33		Pending
Bristol-Myers Co.,	11/27/34	4	Pending
Yardley & Co., Ltd.	4/15/35		Pending

Proposed Drug Manufacturing Codes

Certain Provisions in the Original Code Filed by the Associated Manufacturers of Toilet Articles.

Article VII - Sales Representatives - It is an unfair trade practice for a manufacturer in promoting sales to the public by persons who are employed or influenced to act as his agents to permit them to malign, disparage, or utter untruthful statements regarding competing merchandise. Recognizing that the majority of the retail stores of the United States are opposed to unfair substitution and maligning of competing merchandise and are endeavoring to correct such practices, it shall be the duty of manufacturers employing demonstrators or sales representatives in retail stores to exact from every such employee, as a prerequisite to employment, a written pledge that such employee will refrain from unfair substitution and maligning of competing merchandise. This pledge shall be signed in duplicate by the employee and one copy furnished to the retail store and the duplicate copy retained by the manufacturer. This pledge shall read as follows:

> "I hereby agree so long as I am employed in (insert store's name) representing (here insert name of manufacturer) I will under no circumstances make disparaging or uncomplimentary remarks tending to create directly or by inference an unfavorable impression of competing merchandise or to retard its sale.
>
> "I also pledge myself to serve the public faithfully with

"merchandise asked for, and under no circumstances to resort to unfair substitution of the products I represent for those which are so requested.

"I understand that the sales methods above forbidden are declared unfair trade practices under the NRA and that if found guilty of them my employment as a demonstrator or sales representative will be considered an unfair trade practice under this Act and prohibited accordingly.

"Signed..... Demonstrator."

It shall be considered an unfair trade practice for a manufacturer to continue to employ a demonstrator or sales representative guilty of any of the unfair trade practices referred to in this pledge.

Bribes, gratuities, gifts, P.M.'s and all forms of special commissions paid by manufacturers directly or indirectly to influence retail employees to promote the sale of particular merchandise, shall be considered an unfair trade practice.

Article VIII - Distribution. The sale of merchandise at different prices to the same classes of distributors for similar quantities or any other method of price discrimination except for quantities and distance, shall be considered an unfair trade practice.

The payment of the wages of a special sales representative by the manufacturer in a retail establishment shall not be considered a form of price discrimination, nor shall cooperative advertising, the expense of which is borne or shared by manufacturer and retailer, payment for window displays be considered a form of price discrimination.

Article IX - Price Stabilization. (Right to contract for Resale Prices). It shall be lawful for any member of this association or manufacturer licensed under this code to make agreements with his customers as to the resale prices by said customers of the products of said manufacturer, either at wholesale or retail. It shall also be lawful for the wholesalers of the products of said manufacturer to make agreements with their customers for the resale of the products of said manufacturer at retail. Such resale price agreements may include cost plus overhead and a reasonable profit.

Certain Provisions in the Original Code Files by the Perfumery and Cosmetic Institute.

Article C. Rule 6. Code Relating to Prices. (Open Price System including the right to contract for resale prices.) The members of the industry who are manufacturers agree that where a commodity or article manufactured by them bears (or the label or container of which bears) the trade-mark, brand or name of the producer or owner of such commodity or article, such manufacturers shall publish and circulate to the purchasing trade their respective price-lists to wholesale purchasers, which price-lists shall also contain the terms of sale. The members of

the industry shall have the right to incorporate in such published price-lists the selling price of the commodity or article to which they desire the retailer to adhere. In such case the wholesale purchaser shall furnish the retailer with the specified retail selling price. It shall be lawful for the members of the industry to provide by contract that the vendee will not resell such article or commodity except at the price or prices stipulated in such price-list or contract, or that the vendee shall require any retailer to whom he may resell such article or commodity to agree that he will not in turn resell except at the price or prices stipulated in such price-list or contract: Provided, that prices stipulated in any such price-list or contract shall be uniform to all vendees in like circumstances, differing only as to quantity of such commodity sold, the point of delivery, and the manner of settlement.

Rule 7. Any such agreement in a contract or stipulation or price-list affecting such article or commodity shall be deemed to contain the implied condition that such article or commodity may be resold without reference to such agreement, stipulation or price-list----

(1) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in such commodity; or
(2) In disposing of such commodity when damaged, deteriorated, or soiled, with prominent notice to the public that such is the case; or
(3) By a receiver, trustee, or other officer acting under the order of any court.

Provided, in any of the foregoing cases that such article or commodity shall have first been offered to the manufacturer thereof by such vendee or the legal representative of such vendee, by written offer, at the price paid for same by such vendee, less the amount of the reasonable reconditioning charge necessary to restore to the original condition such article or the packing thereof, in cases of deterioration or obsolescence; and that such manufacturer, after reasonable opportunity to inspect such article or commodity, shall have refused or neglected to accept such offer.

Such price lists, contracts or stipulations affecting the sale of such article or commodity may provide for disposal and/or seasonal sales at appropriate times, during which periods such article or commodity may be resold without reference to such price lists or agreement: Provided, that such articles or commodity shall have first been offered to the vendor by such vendee, by written offer, at the price paid for the same by such vendee, and that such vendor, not less than thirty (30) days prior to the date stipulated in such contract for the next such disposal and/or seasonal sale, after reasonable opportunity to inspect such article or commodity, shall have refused or neglected to accept such offer.

The members of the industry shall have the right to refuse to sell to wholesalers or retailers, as the case may be, who fail to observe the indicated or stipulated selling price.

The members of the industry shall have the right to circulate information relative to retailers and others who fail to observe the provisions of this rule.

Upon the request by a manufacturer a retailer shall be obliged to furnish such manufacturer with the names of the wholesaler from whom such retailer obtained the merchandise, the product of the manufacturer.

Rule 8. The combination of articles or commodities embraced within this code with articles or commodities not within the same at a total price less than the usual indicated, or stipulated price or prices of the articles sold by members of the industry plus the usual selling prices of the articles or commodities not embraced within this code shall be deemed an unlawful cutting of prices within the meaning of the code.

Certain Provisions in the Original Code Filed by the Package Medicine Industry.

Article II. Membership (b) Every person, firm or corporation engaged in the manufacture, distribution and sale of drug products, toilet preparations and cosmetics, is eligible to membership in The Proprietary Association of America and United Medicine Manufacturers of America, Inc., and to participate in the operations and activities under this Code and any subsequent revision thereof or amendments thereto.

Article V. Prices. On and after the effective date of this Code, manufacturers, wholesalers and retailers shall abide by the following standards of practices in marketing and selling merchandise in original consumer packages:

(a) A "retail price" to the public should appear on the package. If not, a fixed price must be established and publicly declared by the manufacturer.

(b) A "wholesale price" to the retailer (a manufacturer's list price) must not be greater than 66/2-3% of the "retail price".

(c) A "factory price" to the wholesaler must not be greater than 60% of the "retail price" nor greater than 90% of the "wholesale price".

(d) "Cash discounts" or "prompt payment discounts" by the wholesaler must not be greater than 2% of the actual selling price.

(e) "A 'cut price' by the retailer because of special sales, combination sales, volume business, or any other reason, must not be at a discount greater than 21% of the "retail price". Items bearing a "retail price" of ten cents or less must be sold at full price.

(f) A "cut price" or "quantity price" by the wholesaler because of special sales, combination sales, volume business, or any other reason, must not be greater than 33/1-3% of the difference between the "wholesale price" and the "factory price".

(g) "Trading stamps", "coupons", and "rebate slips" as a result of purchases from the retailer by the consumer are prohibited if they destroy or are contrary to the sales policies specified herein.

(h) A "sale policy" established by a manufacturer covering the sale, terms and prices of his products must be adhered to, provided it is not detrimental to the above policies as outlined.

(i) A "sales policy" established by a manufacturer must be open and fair to all, with the same allowance, terms and prices as to products, quantities, or trade classifications.

(j) Compensation paid to wholesaler or retailer by manufacturer for cooperative advertising, counter displays, windown displays, salesmen's efforts, or any other special sales activities, should be uniform according to kind and scope of services rendered, and not on a basis of discounts on quantity purchases.

(k) Added costs because of taxation by city, state or federal government cannot destroy the policies outlined above but must be considered as a part of costs of selling in applying these policies.

(l) Retailers and wholesalers must allow a free, unrestricted market to merchandise sold in accordance with these standard practices, and are working contrary to the interests of the trade as a whole if they attempt to substitute or divert sales on such requested merchandise.

(m) On and after the effective date of this code, no manufacturer shall sell to any customer at a price below his own cost of production or manufacture.

Article VI. Trade Practices (d) Manufacture by Wholesalers. It is unfair competition and an undesirable and uneconomical practice for the wholesaler to carry on the manufacture or distribution of products in competition with nationally advertised products, and the manufacture of such competitive products by the wholesaler, or to his order, shall be prohibited.

Article VI. Trade Practices (c) Imitation. It is unfair competition to produce or market a product which by its labels, packages or special designs or by simulation of advertising or of trade names is made to imitate the product of another manufacturer, or knowingly to sell, handle or deal in, either at wholesale or retail, such imitations of any manufacturer having prior legal rights.

(f) Repackaging. Except when authorized by the owner of the formula or trade-mark, the repackaging or transferring of any article from the container of the manufacturer into another container, and the offering of such repackaged item for sale, in competition with the manufacturer's own product, is an unfair trade practice.

(g) Counterfeiting. In order to protect against the counterfeiting of packaged medicinal products, purchases of such products should be made only through legitimate channels, that is, from the manufacturer

or his recognized distributors.

Article VI. Trade Practices (h) Substitution and Switching. Where a manufacturer, through enterprise, advertising or reputation, has built a trade for any article he is entitled to profit therefrom, and any interference with the normal demand of trade or of consumers is unfair. A practice has developed in the drug trade known as "switching". Such practice is the wilful furnishing by the dealer either with or without the knowledge of the purchaser, of goods other than those requested. Such practice is neither fair to the purchaser nor the manufacturer of the article requested, and constitutes a reprehensible and unfair practice.

(i) It is unfair to switch or substitute, or to attempt to switch or substitute, one product for another by either wholesaler or retailer, or to make false or disparaging statements regarding the products or prices of a manufacturer, or concerning the method of business or integrity of any dealer or manufacturer. When a product is asked for by name, it shall be sold.

(j) Any rebate, allowance, or discount given secretly by manufacturer to wholesaler or retailer, or by wholesaler to retailer, is unfair competition. Compensation paid to wholesaler or retailer by manufacturer for cooperative advertising, counter displays, window displays, salesmen's efforts, or other special sales activities, should be paid for uniformly according to kind and scope of services offered and not on a basis of discounts on purchases.

Proposed Wholesale Drug Codes.

Correspondence Relating to an Informal Wholesale Drug Code.

"Washington, D. C.,
July 25, 1933.

Mr. A. D. Whiteside,
Room 4830, Commerce Building,
Washington, D. C.

Dear Mr. Whiteside:

Enclosed is tentative memorandum suggested as a basis of discussion for a code for the wholesale drug industry.

Sincerely yours,

RJ:PB

(signed) Robert Jackson."

"July 27, 1933.

"Mr. Robert Jackson,
The Mayflower,
Washington, D. C.

Dear Mr. Jackson:

I have your letter of June 25, inclosing the memorandum regarding a code for the wholesale drug industry.

I have not had an opportunity to think it over carefully but I shall do so and get in touch again.

Very truly yours,

ADW/lmn

A. D. Whiteside. "

Tentative Memorandum as a Basis of Discussion in re: "Code for Wholesale Drug Industry" Under the National Industrial Recovery Act.

PREAMBLE

"We, the National Wholesale Druggists' Association, established with a membership of , fully qualified and equipped to fulfill all the needs and requirements of the medical profession and approximately 60,000 retail druggists in the interest of the public health, realizing that individual members and associations as such cannot by independent action carry out effectively the policy of Title I of the National Industrial Recovery Act, realizing also that cooperative action with enforceable performance offers the only practical solution in order to induce and maintain united action to improve the standards of labor, reduce unemployment, establish justice, equality and fair trade practices in our industry and in general, to effectuate in letter and spirit, the policies of the National Industrial Recovery Act, do ordain and establish, subject to the approval of the President, the following code of fair trade practice for wholesale druggists in the United States of America and its possessions.

Section 6. Wholesale Druggists' Relations with Manufacturers.

(A) No Wholesale druggist or wholesale distributor within the meaning of this code snall purchase or distribute a product of any manufacturer whose policy shall not conform to the following principles of fair trade practice:

(1) Each manufacturer shall establish two separate and distinct price-lists or price schedules covering each product manufactured, produced, packed or caused to be manufactured, produced, or packed by him, one- strictly for wholesale druggists or wholesale distributors, and one - exclusively for retail druggists or retail distributors,

establishing and making public at the same time, his sales policy which must be open and fair to all, with the same benefits, allowances, terms and prices as to products, quantities or trade classifications made available to whoever fulfills the necessary requirements under said policy.

No manufacturer shall by reason of quantity purchase or any other reason allow to a wholesale purchaser or retail purchaser of his product, any rebates or concessions of any nature or description that are not set forth and disclosed in his wholesale and/or retail price list or price schedule hereinbefore mentioned, or revisions thereof, and made available to any and all wholesale druggists and/or retail druggists as the case may be; particularly, special allowances for window and/or counter and store displays, the payment of bonus or other compensation to sales people or buyers, or contributing in whole or in part to any advertising or any other service of any nature or description that the wholesale druggist or retail druggist or their respective employees or agents can or may render a manufacturer, are condemned unless made available to any and all wholesale druggists and/or wholesale distributors or retail druggists and/or retail distributors, as the case may be, under the same conditions.

(2) A manufacturer's policy shall provide a minimum compensation to a wholesale druggist or wholesale distributor operating under this code of not less than 15% trade discount and not less than 2% cash or prompt payment discount.

(3) A retail price to the public should appear on the package. If not, a fixed price must be established and publicly declared by the manufacturer.

(4) Upon notice to the manufacturer by this organization that a wholesale druggist or wholesale distributor or retail druggist or retail distributor has violated or is violating a manufacturer's policy as published by said manufacturer, said manufacturer shall cease and cause all his wholesale distributors or agents to cease supplying his product to the offender.

(5) A manufacturer shall establish his price list or price schedule on the basis of prepaying freight to all points within the United States so that prices quoted on his products to wholesale distributors and retail distributors in said schedule are on an equal and uniform basis at all points within the United States.

Section 7. Policy on Manufacturers' Price Lists and Discount Sheets Covering Medicinal, Toiletry and Sundry Proprietaries.

All discounts allowed to a wholesale druggist or wholesale distributor by a manufacturer as his compensation for performing the services of a wholesaler, whether they be trade, cash or otherwise, as well as any free goods, bonus or other compensation of any nature or description, shall be retained by said wholesale druggist or wholesale distributor and under no circumstances shall they be passed on to a retail druggist

or retail distributor for the purpose of inducing said retail druggist or retail distributor to patronize such wholesale druggist or wholesale distributor, by reason of preferential treatment or for other reasons, except as follows:

Each wholesale druggist or wholesale distributor operating this code may allow to a retail druggist or retail distributor as defined herein, quantity discounts on the following basis, namely:

On items of less than $2.00 "LINE EXTENSION" (as line extension is defined herein*) - 1% discount allowed:

On items of $2.00 "LINE EXTENSION" but not exceeding $7.99 "LINE EXTENSION", a discount may be allowed not to exceed 25% of the wholesale discount allowed to the wholesale druggist or wholesale distributor by the manufacturer.

On a "LINE EXTENSION" of $8.00 or over, a discount may be allowed not to exceed 33-1/3% of the discount allowed to the wholesale druggist or wholesale distributor by the manufacturer, but in no instance is the difference as computed above to show less than 8% gross profit to the wholesale druggist or wholesale distributor as compensation for his wholesale distributing services.

In addition thereto, the following quantity bonus discounts may be allowed on the basis of total monthly purchases made by the retail druggist or retail distributor from the wholesale druggist or wholesale distributor, viz:

1% additional discount on total monthly purchases of $300 to $500;

2% additional discount on total monthly purchases of $501 to $1,000;

3% additional discount on total monthly purchases exceeding $1,000.

All discounts hereinbefore mentioned to be considered as "Cash Discounts" as defined in Section 8 and shall be applicable to a standard discount list of Medicinal, Toiletry and Sundry Proprietary Items, containing in the aggregate, not less than 10,000 items prepared by the Board of Governors of this Association and filed as a public record for the benefit of all retail druggists and retail dealers, with the secretary of this association.

No item shall appear in said standard discount list of a manufacturer whose sales policy is adverse to the granting of any such discounts as indicated above.

Section 9. Elimination of Unfair Competition and Competitive Practices.

No wholesale druggist or wholesale distributor as defined herein shall pass on to a buyer, any part of the compensation allowed him as a

wholesale druggist or wholesale distributor by any manufacturer (except as herein provided) nor shall he pass on or accord to a buyer directly or indirectly, any advantages received by him from said manufacturer, of any nature or description, be they in the form of free goods or premium or other merchandise, article, coupon or other evidences of advantage or incudement or benefit of any nature or description, whether they be present or in the future, unless such advantages, benefits or inducements have been accorded him by the manufacturer whose product is involved for the specific purpose and with specific instructions and authority on the part of the manufacturer that they be passed on to the retail druggist or retail distributor by the wholesale druggist or wholesale distributor.

In all cases where manufacturers offer to a wholesale druggist or wholesale distributor any special advantages of any nature or description as set forth above with specific instructions that they be passed on to a retail druggist or retail distributor and said wholesale druggist or wholesale distributor retains same or fails to pass such advantages, benefits or inducements on to the retail druggist or retail distributor in violation of such instructions on the part of the manufacturer, such violation shall be deemed unfair competition and punishable by a fine of not less than $ for each specific offense, if upon majority vote of the Board of Governors of this Association, the offender shall be found guilty of such practice.

Section 10. The practice of manufacturers selling direct to retail druggists or retail distributors on the same discounts, terms and conditions as offered to the wholesale druggist or wholesale distributor, shall be considered unfair practice and competition on the part of said manufacturer and a wholesale druggist or wholesale distributor operating under this code shall not be obligated nor required to purchase any product from any manufacturer on which the manufacturer establishes a price differential between wholesale druggists' or wholesale distributors' and retail druggists' or retail distributors' prices of less than 15%.

The practice of manufacturers according to retail chain store systems, department stores, mail order houses, syndicate stores and any and all other organized systems of distribution, the majority of whose business is conducted direct with the consumer, any prices, terms, conditions, special inducements or advantages and special allowances for window or store display or advertising, without according the prices, terms, conditions and special inducements or advantages to any and all other independent retail druggists or independent retail distributors that desire to take advantage of same under the same terms and conditions, shall be considered unfair competition and discrimination against independent or individual retail druggists or independent or individual retail distributors.

Section 15. Policy with Respect to the Protection of the Independent Retail Druggists' or Retail Distributors' Interest

The wholesale druggist or wholesale distributor recognizes as a fact, after diligent investigation and research over a period of years, that the total fair average cost of distributing to a retail druggist

or retail distributor is not less than 27%. Therefore, each wholesale druggist or wholesale distributor operating under this code is committed to a policy of purchasing, featuring and supporting the products of only those manufacturers whose sales policy, terms and conditions will insure and protect the independent retail druggist or retail distributor against loss caused by predatory price-cutting practices of retail distributors of proprietaries employing cheap labor, maintaining inferior retail distributing outlets and generally, not recognized within the meaning of the laws of the several different states as duly authorized and licensed retail druggists, or even in cases where recognized as licensed retail druggist, adopt the policy of featuring standard and nationally advertised proprietary medicinals, toiletries, and sundries at cut prices on the basis of cost, or under cost, to attract and entice trade to themselves in the localities in which they operate, all to the detriment and destruction of other individual or independent retail druggists or individual or independent retail distributors.

Certain Provisions of the Original Code Presented by the National Wholesale Druggists' Association:

Article V - Section 1. From time to time after the effective date of this code, the Drug Institute of America, Inc., shall publish or cause to be published and shall furnish or cause to be furnished to each wholesale druggist who is a member of the code lists specifying the "cost-sold" of as many items and groups of items of merchandise as practicable, and from time to time shall publish or cause to be published and shall furnish or cause to be furnished to each member of the code as promptly as practicable any amendment of the "cost-sold" of any such items and groups of items of merchandise when and as circumstances require such amendment. The "cost-sold" of any such item or group of items of merchandise shall be calculated by the Drug Institute of America, Inc., in consultation with the Statistical Division of the National Wholesale Druggists' Association and the Federal Wholesale Druggists' Association on the basis of their own research and the economic, statistical and accounting reports submitted to them from time to time by members of the Code. In calculating the "cost-sold" of any merchandise, the cost to the entire Wholesale Drug Industry shall be approximately determined, including cost of acquisition or replacement of the merchandise, handling charges, the allocable portion of overhead, including all general and administrative expense and taxes, the cost of sales and deliveries, and any other appropriate charges, all determined in accordance with good accounting practice. The "cost-sold" of any merchandise may, in the discretion of the Drug Institute of America, Inc., be published in the form of manufacturers' list prices with specified maximum discounts indicated. The "cost-sold" of any specified merchandise, or any amendment of such "cost-sold" shall go into effect on the tenth day following its publication, as above provided; and no member of the code shall sell any such specified merchandise at a price or prices below the "cost-sold" therefor in effect at the time of the sale or of contracting to sell. All discounts allowed by members of the code shall be cash discounts and shall be allowed only if paid within the customary cash discount period; and no discount whatever shall be allowed which brings the net selling price to the purchaser of any merchandise below the "cost-sold" then in effect for such merchandise.

Section 2. Subject to such regulations as may be adopted in a code for the enitre drug industry: (a) wholesale druggist's shall have the right to contract with manufacturers to observe the resale prices of proprietary and/or trade-marked merchandise at all times during the operation of this code; and (b) wholesale druggists shall the right to contract with retail druggists Or other distributors of merchandise to observe the resale prices proprietary and.or trade-marked merchandise as established by the manufacturer

CERTAIN PROVISIONS OF THE ORIGINAL CODE PRESENTED BY THE FEDERAL WHOLE* SALE DRUGGISTS' ASSOCIATION:

Rules on Behalf of Manufacturers

Rule 1. The distribution of drug products shall be confined to the essential channels of drug distribution

Rule 2. The sale of merchandise below the cost of production and distribution, plus the interest on the capital invested and a reasonable profit, is hereby declared to be an unfair method of competition within the meaning of the Federal Trade Commission Act and the Industrial Recovery Act.

Rules on Behalf of Cooperative and Mutual Wholesale Druggists

Rule 4. The sale of merchandise below its cost plus the cost of doing business, interest on the capital invested and a reasonable profit, is hereby declared to be an unfair method of competition within the meaning of the Federal Trade Commission Act and the Industrial Recovery Act, because it reduces employment lowers the wage scale, precludes earnings on capital investment and payment of income taxes.

Rules on Behalf of Retail Druggists

Rule 1. To make possible the reemployment of registered pharmacists and all other employees of drug stores, a minimum price schedule shall be established as follows: Minimum price to be based on manufacturers' list price plus average cost of doing business in a retail drug store (23% of gross sales, which is 4% less than St. Louis Survey); this schedule will provide for a reasonable net profit on sales for interest on capital invested, income taxes and additional employment at higher wage scale.. The sale of merchandise, or services, at a price which does not allow for the foregoing considerations shall be an unfair method of competition within the meaning of the Federal Trade Commission Act and the Industrial Recovery Act.

Rule 2. No medicinal preparations or drug products shall be sold at retail except through legitimate drug outlets, except in small towns not large enough to support a drug store. "Legitimate outlet" is hereby defined as a retail establishment under the supervision of a registered pharmacist.

Certain Provisions of the Original Code presented by the Independent Wholesale Druggist's Association:

Article IV. Selling Prices

Section 1. In Order to provide, at least that labor shall be paid, wholesale druggists shall sell all merchandise at not less than 5% above net invoice cost (after all discounts, including cash discounts, have been deducted) or open market price, which ever is lower.

Section 2. All discounts allowed by wholesale druggists shall be cash discounts and shall be allowed only if paid within the customary cash discount period; and no discount whatever shall be allowed which brings that net selling price below 5% above the wholesale druggists' net invoice cost nor below 5% above the open market price, whichever is lower.

Certain Provisions of the Original Code presented by the Allied Wholesale Druggists' Association

Rule 1. The sale of merchandise by wholesalers below the cost of purchase and distribution, plus the interest on capital invested and a reasonable profit, is hereby declared to be an unfair trade practice.

Rule 2. Arbitrary discrimination by manufacturers of nationally advertised products in the selection of their distributors is hereby declared to be an unfair trade practice.

Rule 3. The refusal on the part of any manufacturer of nationally advertised drug products to sell the same to any wholesalers or to impose discriminating conditions or restrictions on the sale of same, is hereby declared to be an unfair trade practice.

Manufacturers Who adopted Refusal-to-Sell Policies in 1926:

Allaire Woodward Company
American Dry Ginger Ale Co.,
Armand Company, Inc.,
A. P. Babcock Co., Inc.
The Bonnie B. Company
Buffalo Spec. Company
Chamberlain Med. Co.,
Clinical Labs
Clicquot Club
Colgate & Co.,
Coty, Inc.,
Deshell Labs, Inc.
Devoe & Reynolds
The Dodd Med. Co. Of U.S.
Drug Store Products Co.,
E. I. DuPont De Nemours, Inc.
Mary T. Goldman Co.,
Hand Medicine Co.
Merck & Company
National Toilet Company
Princess Pat, Ltd.
Prophylactic Brush Co.,
Schneffel Brothers,
Squibb & Sons Mineral Oil & Tooth Paste
Sunbeam Chemical Co.,
The Swift Specific Co.,
United Toilet Goods Co.,
Van Ess Labs, Inc.,
Vivadou, Inc.
Wildroot Co., Inc.
Welch Grape Juice Co., Inc.
Zonite Products Co.,
Bourjois, Inc.
Ayer Company
Melba Company
Boncilla Laboratories,

MANUFACTURERS WHO ADOPTED REFUSAL-to-Sell Policies in 1933 (Cont)

Edna Wallace Hopper, Inc.	Henry Thayer & Company
Houbigant, Inc.	J. M. Marllatt
International Prop.	Piner Company
Iodent Co.,	Othine Laboratories
Walter Janvier Co.,	McEwen, Cameron, Ltd.
Jarnac et Cie	Cellu-cotton Products Company
John son & Johnson	Vicks Chemical Company
Spencer Kellogg Co.,	W. J. Young Jr. (Absorbine, Jr.)
The Kolynos Co.,	Wells, Richardson Company
Larfes Corporation	Harold F. Ritchie & Co., (Parfise, Inc.)
Lazell Perfumer	Paris Medicine Company (Grove)
Ben Levy Company	Plosser Company
The Marinello Co.,	Denver Chemical Company
The Mennen Company	Yardley & Company

Proposed Executive Order Establishing the
Drug Industry Coordinating Council

Pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, and to effectuate the purposes of said Act, and of the several codes promulgated thereunder in or directly related to the Drug Industry, and to provide and Agency for planning and coordinating the action of the Code Authorities under the said several codes, and for regularizing employment within the Drug Industry, I Franklin D. Roosevelt, President of the United States, hereby establish a Drug Industry Coordinating Council. The said Council shall have the following organization powers and duties:

The Drug Industry Coordinating Council (hereinafter referred to as the Council) shall consist of representatives from the trades and industries hereinbelow set forth and such other trades or industries as the Administrator for Industrial Recovery may from time to time determine to be industries directly related to the Drug Industry. The Administrator, in his discretion, may appoint such additional members (not more than three(3) to serve upon the Council without vote and to represent the Government or such groups of interstate as the Administrator may designate.

The following industries shall have membership on the Council, the number of members allotted to each, and the manner of their selection being hereinbelow set forth:

The National Retail Drug Code Authority shall elect two members to the Council, of whom one shall be a member of such Code Authority, and the other shall be a person identified with the Industry but not actively engaged in the retail drug business.

The Wholesale Drug Code Authority shall elect two members to the Council, of whom one shall be a member of such Code Authority and the other shall be a person identified with the Industry but not actively engaged in the wholesale drug business.

The Code Authority of each of the following branches of the Manufacturing Drug Industry shall elect one of its member to the Council:

Perfume, Cosmetic and Other Toilet Preparations Industry
Package Medicine Industry
Pharmaceutical and Biological Industry
Medicinal Chemical Industry
Natural Organic Products Industry.

Such manufacturing members of the Council shall elect to the Council a person who is identified with the Manufacturing Drug Industry but who is not actively engaged in any branch of the Manufacturing Drug Industry.

Pending the approval of a code for any constituent branch of the Drug Industry and the election by its Code Authority of a representative or representatives to the Council, the Administrator for Industrial Recovery shall appoint a temporary representative or representatives to serve on the council for such constituent branch of the Drug Indusfry.

The Council shall have the following powers and duties:

1. To adopt by-laws and rules and regulations for its procedure and for the administration of this Order

2. To carry out such powers as are delegated to it by the several code authorities of the industries directly related to the Drug Industry in order to promote joint and harmonious action among such Industries upon matter of common interest, and in order to coordinate the administration of the several codes for such Industries.

3. To secure an equitable and proportionate payment of the expenses of maintaining the council and its activities from the several Code Authorities of the Industries directly related to the Drug Industry which are represented upon the Council.

4. To cooperate with the Administrator and with the several Code Authorities of the Industries directly related to the Drug Industry in the enforcement and administration of the Codes for such industries.

5. To report to the Administrator and the Several Code Authorities on the condition of the Drug Industry.

6. To consider and make recommendations to the several Code Authorities and the Administrator for the amendment of existing approved codes for industries directly related to the Drug Industry and to consider and recommend plans for coordinating and strengthening provisions in Codes for such industries in order to provide stabilization, regularize employment, better working conditions, make for more ethical competition, and to promote the interests of the consumer, labor and the industry.

7. To decide subject to review by the Administrator, disputed cases of jurisdiction of the several codes in the Drug Industry.

8. To establish a COMMITTEE ON STATISTICS AND PLANNING TO WHICH may be delegated the following powers and duties:

(a) To gather from the several code authorities and from other sources, such statistical information as, in its discretion or in the discretion of the Administrator, is necessary to a proper coordination of the Drug Industry and to effect the purposes of the National Industrial Recovery Act; and to digest and analyze such statistics and to prepare reports and make recommendations based thereon to the Council for its action.

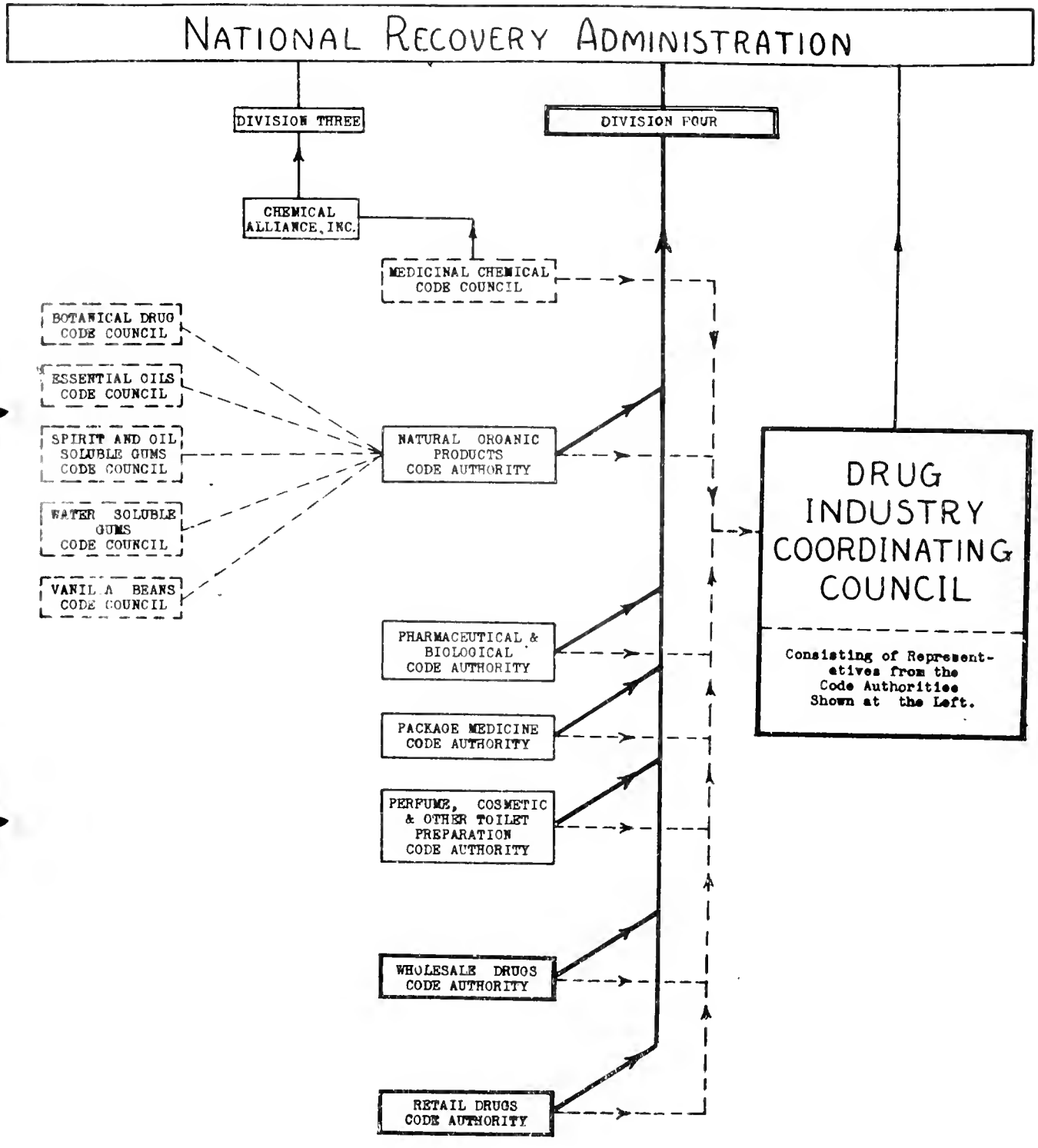
(b) To propose modifications or amendments of the provisions of the several codes for the industries directely related to the Drug Industry.

(c) To report to any Code Authority of an Industry directly related to the Drug Industry, upon its request, such statistical information as will assist such code authority in the administration and enforcement of its code.

Approval Recommended:

_____
Administrator

The White House
April 1934


NATIONAL RECOVERY ADMINISTRATION
DIVISION THREE
DIVISION FOUR
CHEMICAL ALLIANCE, INC.
MEDICINAL CHEMICAL CODE COUNCIL
BOTANICAL DRUG CODE COUNCIL
ESSENTIAL OILS CODE COUNCIL
SPIRIT AND OIL SOLUBLE GUMS CODE COUNCIL
WATER SOLUBLE GUMS CODE COUNCIL
VANIL A BEANS CODE COUNCIL
NATURAL ORGANIC PRODUCTS CODE AUTHORITY
PHARMACEUTICAL & BIOLOGICAL CODE AUTHORITY
PACKAGE MEDICINE CODE AUTHORITY
PERFUME, COSMETIC & OTHER TOILET PREPARATION CODE AUTHORITY
WHOLESALE DRUGS CODE AUTHORITY
RETAIL DRUGS CODE AUTHORITY
DRUG INDUSTRY COORDINATING COUNCIL
Consisting of Representatives from the Code Authorities Shown at the Left.

9726

Open Price Provision of The Perfume, Cosmetic and Other Toilet Preparations Code as Presented at the Public Hearing on January 17, 1934.

Article VII - Trade Practice Provisions

Section 1. (a) Where a commodity or article manufactured by a member of the industry bears (or its label or container bears) the trademark, brand, or name of the producer or owner of such commodity or article it shall be sold only on the basis of open prices to those engaged as primary distributors of its products, clearly setting forth the basis for granting of discounts, i.e., specifying the particular function which must be performed or the quantities which must be purchased which are uniform to all trade buyers of the same class of distributors which are strictly adhered to while effective.

(b) The term "open prices", as used in this section means a price list which is published by each member of the industry for the equal information of all primary distributors in the separate or the several classes of primary distributors, and which states all the prevailing terms of sale for the separate or the several classes of primary distributors.

(c) This section shall be strictly construed to prohibit any direct or indirect price concession and/or payment of compensation for the functions performed by those engaged as primary distributors which is not declared in the published price list. The term "indirect price concession" as used in this paragraph means any price concession indirectly made by a member of the industry to a primary distributor or his agent through a rebate or allowance or commission or refund or payment or deal or gift or by any other means whatever.

(d) Nothing in this section shall be interpreted so as to limit the right of a member of the industry to select or classify his primary distributors as he shall see fit.

(e) If the manufacturer's published price list includes a suggested price to the consumer it shall be lawful for him to include a maximum discount from this price which he desires to have observed in sales by the retailer. It shall be lawful for the terms of sale published by the manufacturer in accordance with this section to include a stipulation that such considerations concerning maximum discount from the suggested price be observed by the primary distributor and shall form part of the terms of sale of goods sold by him to other distributors.

Section 2. Terms of sale shall permit of the disposal of an article or commodity without reference to such stipulations concerning resale:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in such article or commodity; or

(b) In disposing of such article or commodity when damaged, deteriorated, or soiled, with prominent notice to the public that such is the case; or

(c) By a receiver, trustee, or other officer acting under the order of any court.

Provided, in any of the foregoing cases that such article or commodity shall have first been offered to the manufacturer thereof by such vendee or the legal representative of such vendee, by written offer, at the price paid for the same by such vendee, less the amount of the reasonable reconditioning charge necessary to restore to the original condition such article or the packing thereof, in cases of deterioration or obsolescence; and that such manufacturer, after reasonable opportunity to inspect such article or commodity, shall have refused or neglected to accept such offer.

(F) Each member of the industry or his agent shall file his current price list with the Code Authority within thirty (30) days after the approval of this Code. Each member of the industry shall file (by registered mail) any subsequent revision of such price list with said Code Authority five (5) days prior to its adoption. No member of the industry shall deviate from his prevailing price list filed with said Code Authority until five (5) days after a revised and substitute price list is mailed to said Code Authority.

Clauses A, B, C, and F shall not apply as to private brands on contracts for the sale thereof, or to the sale of products for export or to bids submitted to governmental units.

The following additional provision was presented by the sponsoring committee during the Hearing.

G. That within thirty (30) days after the effective date of this Code, every member of this industry shall file with the Code Authority all brand names owned or used by them. And thereafter no trade mark, brand or trade name may be used unless filed with the Code Authority within five (5) days after the adoption thereof.

Certain Approved Provisions in the Perfume, Cosmetic and Other Toilet Preparations Industry.

Article VII - Trade Practice Provisions.

The Code Authority shall collect evidence as to the effect of the following trade practice provisions in correcting the competitive abuses in this industry. The Code Authority shall report to the Administrator six months after the effective date of this Code, or before if the facts warrant, on the conditions in the industry. If the trade practice provisions in this Code are not adequate to correct the competitive abuses, the Code Authority shall recommend such modifications of or additions to the trade practice provisions which they deem necessary and upon approval by the Administrator, after such hearings as he shall specify, such recommendations shall become operative as a part of this Code.

Section 1. (a) Where a commodity or article sold by a member of the industry bears (or its label or container bears), the trade-mark, brand, or name of the producer or owner of such commodity or article it shall be sold only on the basis of open prices to those engaged as primary distributors of its products, clearly setting forth the basis for granting of discounts, (specifying the particular function which must be performed or the quantities which must be purchased) which are uniform to all trade buyers of the same class of distributors and which are strictly adhered to while effective.

No member of the industry shall offer a discount, payment, or allowance on a functional basis except where an effective means exists for assuring the Code Authority that the function for which the payment is made can be actually and faithfully performed.

(b) The term "open prices" as used in this section means a price list which is published by each member of the industry for the equal information of all primary distributors in the separate or the several classes of primary distributors, and which states all the prevailing terms of sale for the separate or the several classes of primary distributors.

(c) This Section shall be strictly construed to prohibit any direct or indirect price concession and/or payment of compensation for the functions performed by those engaged as primary distributors which is not declared in the published price list. The term "indirect price concession" as used in this paragraph means any concession or payment indirectly made by a member of the industry to a primary distributor or his agent, or his employee, through a rebate or allowance or commission or refund or P.M. or payment or deal or gift or by any other means whatever.

(d) Nothing in this section shall be interpreted so as to limit the right of a member of the industry to select or classify his primary distributors as he shall see fit.

(e) Each member of the industry shall file his current price list with the Code Authority within thirty (30) days after the approval of this Code. Each member of the industry shall file (by registered mail) any subsequent revision of such price list with said Code Authority

(f) Within thirty (30) days after the effective date of this Code, every member of this industry shall file with the Code Authority all brand names owned or used by them. And thereafter new trade marks, brands or trade names shall be filed with the Code Authority within five (5) days after the adoption thereof.

This section shall not apply to the sale of private brand products on contract by a manufacturer or private brands to the owner of such private brand, nor to the sale of products for export, nor to bids submitted to governmental units.

Section 2. (a) No member of the industry shall give, permit to be given, or directly offer to give, anything of value for the purpose of influencing or rewarding the action of any employee, agent or representative of another in relation to the business of the employer of such employees, the principal of such agent or the represented party, without the knowledge of such employer, principal or party. This provision shall not be construed to prohibit free and general distribution of articles commonly used for advertising except so far as such articles are actually used for commercial bribery as hereinabove defined.

(b) No member of the industry or his agent shall pay P.M.'s or commissions directly or indirectly to employees of retail dealers to influence the sale of his products.

(This paragraph (b) is stayed for a period of six months after the effective date of this Code, and shall go into effect at the end of this period only upon the approval of the Administrator after such hearing as he shall deem necessary, provided the Code Authority shall have presented to the Administrator sufficient evidence to justify such approval).

Section 3. (a) No member of the industry shall employ or permit to be employed for him any demonstrator or sales employee in a retail establishment whose salary is wholly or partially directly or indirectly paid by the member of the industry or his agent to work in such retail establishment unless such demonstrator or sales employee is clearly and openly identified to the public as the employee or agent of the member of the industry; provided, however, that the demonstrator shall be available at all times for the sale of merchandise.

(b) The payment of wages of a demonstrator or special sales representative by the member of the industry in a retail establishment whose identity is clearly and openly disclosed to the public as being an employee or agent of the member of the industry shall not be considered a form of unfair trade practice or of price discrimination.

Section 4. (a) Cooperative advertising, the expense of which is borne or shared by the member of the industry and retailer, shall not be considered a form of price discrimination, but no payment shall be made for cooperative advertising until the member of the industry has received proof of insertion and statement of the cost of such advertising and the member of the industry's share thereof.

(b) No member of the industry or his agent shall make payment for advertising, where such payment is made for the purpose of paying for the services of a special demonstrator or for the payment of P.M.'s or other gratuities to a dealer's employees.

Certain approved provisions in the Package Medicine Code.

Definition of the Industry:

Section 1. The term "Package Medicine Industry" as used herein shall mean the Industry, each member of which is engaged in the manufacturing and/or in having manufactured for him under his own brand and specifications, and/or in importing in consumer packages for resale, and/or

in packaging from bulk materials under his name or brand, dentrifices, mouth washed and medicinal preparations, for the internal or external use of human beings or other animals and primarily offered for sale to the general public usually as a complete formula in packages with directions for use; and such related branches or subdivisions as may from time to time be included under the provisions of this Code by the President of the United States, after such notice and hearing as he may prescribe.

Modification of definition included in Order of Approval.

. . .provided, however, that there be added to Article II, Section 1 the following sentence:

"This definition does not include any retailer operating under a retail code who performs any of the acts specified herein solely for the purpose of sale at retail to his own customers, and not for the purpose of sale to other distributors; provided, however, that where a retailer operates a laboratory or plant distinct from his retail operations, and employs a special group of employees to work primarily in such laboratory or plant distinct from that group of his employees who work primarily in his retail establishment(s), and such laboratory or plant performs any of the acts specified herein, whether for sale to such retailer's own customers or to other distributors, such laboratory or plant is subject to the provisions of this Code."

Article VII - Trade Practice Provisions.

Section 1 (a) A member of the Industry shall sell his products, commodities or articles to primary distributors on an open price basis that is fair to all, with the same allowances, terms and prices as to products, quantities or trade classifications.

(b) The term "open prices" as used in this section means a price list which is published by each member of the Industry for the equal information of all primary distributors in the separate or the several classes of primary distributors, and which states all the prevailing terms of sale for the separate or the several classes of primary distributors.

(c) Compensation paid to a primary distributor by a member of the Industry for cooperative advertising, counter displays, window displays, salesmen's efforts, or any other special sales activities, shall be uniform according to kind and scope of services rendered, and not on a basis of discounts on quantity purchases.

(d) Each member of the Industry or his agent shall file his current price list with the Code Authority within thirty (30) days after the approval of this Code. Each member of the Industry shall file (by registered mail) any subsequent revision of such price list with said Code Authority.

(e) This section shall not apply to the sale of private brand products on contract by a manufacturer to the owner of such private brand, nor to the sale of products for export, nor to bids submitted to governmental units.

CERTAIN PROVISIONS IN THE PROPOSED WHOLESALE DRUG CODE AS DRAFTED FOR PUBLIC HEARING, MARCH 15, 1934

Article VII, Section 12. - Selling below cost provision. The Code Authority shall cause to be formulated an accounting system and methods of cost finding and/or estimating, capable of use by all members of the industry. After such system and methods have been formulated, with the approval of the Administrator, full details concerning them shall be made available to all members. Thereafter all members shall determine and/or estimate costs in accordance with the principles of such methods and it shall be an unfair trade practice for a wholesale druggist to sell or offer to sell any commodity at a price demonstrably below such cost to him.

Article VII, Section 10. - Trade Relations. (a) In those lines in which manufacturers, importers, mills, or other primary sellers sell coincidentally to several classes of buyers, the Wholesale Drug Code Authority, subject to the approval and with the advice of the Administrator, may arrange for a conference of all interested parties, including primary sellers or the Code Authority governing, for the purpose of defining and establishing price differentials which shall be fair and reasonable in relation to the nature and extent of the distributing services and functions rendered by each buying class. Such differentials shall include all elements affecting the net price, such as discounts, terms, and allowances.

The Wholesale Drug Code Authority, with the advice and consent of the Administrator and after all interested parties shall have been given an opportunity to be heard on the matter, shall formally announce the price differentials which are deemed fair on specific products. When the Wholesale Drug Code Authority announces that a fair wholesale-price differential has been established on any product (by sources competent to adequately serve wholesale druggists) then and thereafter, or until the Wholesale Drug Code Authority announces that such fair price differentials have been discontinued, it shall be an unfair trade practice for a wholesale druggist to handle such product unless the price at which it is sold to him allows or provides for such fair price differential.

Nothing in this section shall be construed to interfere with the right of retailers to buy direct from manufacturers.

Nothing in this section shall be construed to prevent fair price differentials from being allowed on the basis of quantity purchased or such other factors as the Administrator may deem proper.

FAIR TRADE PRACTICE RULES AS ADOPTED BY THE FEDERAL TRADE COMMISSION - WHOLESALE DRUG CONFERENCE

GROUP ONE

Rule 1.--False and Misleading Statements--. The making or publishing of any false, untrue, or deceptive statement by way of advertisement or otherwise concerning the merchandise handled by the industry, having the tendency and capacity to mislead or deceive purchasers or prospective purchasers is an unfair trade practice.

Rule 2.--Defamation of Competitors by falsely imputing to them dishonorable conduct, inability to perform contracts, or other false representations, or the false disparagement of the grade or quality of the goods sold, with the tendency to mislead or deceive purchasers or prospective purchasers, is an unfair trade practice.

Rule 3.--Selling Below Cost--. The selling of goods below cost, with the intent and with the effect of injuring a competitor and where the effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade, is an unfair trade practice.

Rule 4.--Price Discrimination--. Price discrimination, as between purchasers of merchandise, whether in the form of discounts, services, or otherwise contrary to Section 2 of the Clayton Act, is an unfair trade practice.

Rule 5.--Commercial Bribery--. The granting of special or secret remuneration in one form or another to employees of customers or prospective customers, or to employees of competitors' customers or prospective customers, without the knowledge of their employers, to influence the purchase of industry products from the maker or giver of such secret remuneration is an unfair trade practice.

Rule 6.--Secret Rebates--. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers under like terms and conditions, with the intent and with the effect of injuring competitors, and where the effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade, is an unfair trade practice.

Rule 7.--Altering Trade-Marked Merchandise, the Distribution of Trade-Marked merchandise, which merchandise or the containers thereof have been altered in a manner to deceive purchasers or public health authorities, is an unfair trade practice.

Rule 8.--Unlawful Discrimination--. The acceptance of orders by wholesalers for large quantities of merchandise and then making small deliveries at quantity prices to favored purchasers, with the effect of discriminating unlawfully between different customers of the same class, is an unfair trade practice.

Rule 9.--Misrepresenting Character of Business--. For any member of the industry to hold itself out to the public as a wholesale druggist when such is not the fact, or in any other manner to misrepresent the character of his business with the tendency and capacity to mislead and deceive, is an unfair trade practice.

Rule 10.--Imitation of Competitors' Marks--. The imitation of the trade marks, trade names, slogans, or other marks of identification of competitors, having the tendency and capacity to mislead or deceive purchasers or prospective purchasers, is an unfair trade practice.

Rule 11.--Fictitious Prices--. Offering for sale merchandise at a price reduced from a marked up or fictitious price, with the tendency and capacity to mislead or deceive purchasers or prospective purchasers, is an unfair trade practice.

Rule 12.--Threats of Suit for Patent Infringement--. The circulation of threats of suit for infringement of patent or trade mark among customers of competitors, not made in good faith but for the purpose and with the effect of harassing and intimidating customers, is an unfair trade practice.

Rule 13.--Substitution of Merchandise--. The substitution of any drug product or allied products such as cosmetics and supplies for other products ordered without permission, having the tendency and capacity to mislead or deceive purchasers or prospective purchasers, is a practice dangerous to the public health and is an unfair trade practice.

Rule 14.--Publishing Misleading Price Lists--. Publishing and circulating false and misleading price lists, having the tendency and capacity to mislead purchasers or prospective purchasers, is an unfair trade practice.

Rule 15.--Selling Below Cost in Competitors' Territory--. The practice of certain wholesale druggists of shipping and selling certain classes of merchandise into the marketing territories of competitors, below cost, where the effect may be to greatly injure competitors, to substantially lessen competition, or tend to create a monopoly, is an unfair trade practice.

Rule 16.--Price Discrimination Involving Free Trucking Charges--. Secretly granting free trucking or transportation charges (not within city limits) to certain favored customers, and not allowing same to all customers under like terms and conditions, where the effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade, is an unfair trade practice.

Rule 17.--Regular Prices Designated as "Special"--. To represent certain prices and terms as "special", when they are in fact regular prices and regular terms, with the tendency and capacity to mislead and deceive purchasers is an unfair trade practice.

Rule 18.--Trade Marked Items at Fictitious Prices.--. The selling or offering for sale by a wholesaler of any nationally advertised product or trade-marked item of the drug industry, the prices of which are known to the purchasing public at greatly reduced prices under a misrepresentation as to his ability to sell such goods at said reduced prices, and also when the quantity of said goods is entirely inadequate to supply the reasonable trade of the said wholesaler with the tendency and the capacity to mislead or deceive customers or prospective customers, is an unfair trade practice.

Rule 19.--Granting Unreasonable Discounts--. The granting of unreasonable discounts or terms of sale to some buyers and not to others, where such favoritism amounts to or effects an unlawful discrimination in price, is an unfair trade practice.

Rule 20.--Conditional Purchase--. The practice of coercing the purchase of several or a group of products, as a condition to the purchase of one or more products under the exclusive control of the sell sellers, is an unfair trade practice.

Rule 21-- Interference with Competitor's Right to Purchase and Sell.--. The interference with a competitor's right to purchase his products and supplies from whomsoever he chooses or to sell the same to whomsoever he chooses or to engage in any monopolistic practices whatsoever through combination, conspiracy, coercion, boycott, threats, or any other unlawful means is an unfair trade practice.

GROUP TWO

Rule A--Shipping Goods on Consignment--. The abuse or misuse of the practice of shipping goods on consignment is condemned by the industry.

Rule B--Cost Finding--. It is the judgment of the industry that an accurate knowledge of costs is indispensable to intelligent and fair competition, and the general adoption of accurate and standard methods of cost finding is recommended by the industry.

Rule C--Return of Merchandise--. Purchasing merchandise and then without good reason returning same to seller creates waste and loss, increases the cost of doing business to the detriment of both the industry and the public and is condemned by the industry.

Rule D--Invoice--. Withholding from or inserting in the invoice, bill of lading or other document of title, statements which the invoice, bill of lading or other document of title a false record wholly or in part, of the transaction represented on the face thereof, is condemned by the industry.

Rule E--Scientific Research--. It is the judgment of the industry "That the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution cost and prices in actual sales of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to

avoid the waste which inevitably attends the unintelligent conduct of economic enterprise." (Maple Flooring Association vs. United States, 268 U. S. 582, 583)

Unjustifiable criticism of the lawful conduct of such research activities of the industry, whether conducted by individual members thereof or by an association, is condemned by the Industry.

Rule F--Credit Information.--The Industry records its approval of the distribution among members of the Industry of information covering delinquent and slow credit accounts in so far as it may be lawfully done.

Rule G--Free Goods.--The abuse of the practice relating to the distribution and use of free goods, prizes, premiums, gifts and the like, affecting injuriously wholesalers, retailers, and consumers, is condemned by the Industry.

Rule H--Abuse of Buying Power.--The abuse of buying power to force uneconomic or unjust terms of sale upon sellers and the abuse of selling power to force uneconomic or unjust terms of sale upon buyers, are condemned by the Industry.

Rule I.--Costs of Distribution of Merchandise.--It is the sense of this Industry that the Federal Trade Commission investigate the costs of distribution of merchandise for the Wholesale Drug Industry, taking into consideration the cost of wages, taxes, rent, insurance, and other carrying costs, as with this information attempts to reduce wages or to increase the hours of labor or to sell drug products below cost will furnish some evidence of a violation of Rule 15 of the conference rules for the Wholesale Drug Industry.

PROPOSED FEDERAL PRICE CONTROL LEGISLATION FROM 1914 to 1933*

The hearings on the Clayton and allied acts left no doubt in the minds of manufacturers as to the restrictive intent of the anti-trust laws.[1] The book industry and the watch industry, both producing distinctive, differentiated products, were publicly, on the floor of Congress, accused of being trusts. The Supreme Court decisions were curtailing the devices by which manufacturers could control their resale prices,[2] with the result that a more persistent drive for permissive legislation was instituted. The Stevens Bill,[3] the first bill introduced, was designed to enable manufacturers of trade-marked or special brand goods to contract for the sale of such articles of commerce with all the subsequent vendees. A notice of the price and conditions of sale had to be attached to the commodity. The anti-discrimination sentiment of the Congress was incorporated in the act. Price discrimination among vendors of the same distributive level was prohibited; filing of price lists with the Commissioner of Corporations was required. An amendment was proposed requiring annual certification of non-monopoly status.[4] The Metz Bill[5] was an act authorizing price control by notice affixed to the "uniform commodity". "Uniform commodity" was defined as an article in interstate commerce which is uniform as to size, grade and quality with other articles of same price and proprietor. The Act further recuires that price lists be filed with the Bureau of Corporations.

Seven bills[6] were introduced in the 64th Congress. All permitted resale price maintenance contracts. Two of the bills required uniform prices, and the affixing of notice to the goods. All seven required the filing of price lists with either the Bureau of Corporations or the Federal Trade Commission. Three bills prohibited price discrimination among vendors of the same distributive levels. In every instance resale price maintenance contracts were prohibited when a monopoly existed.

The ten bills[7] that were introduced during the 65th through 68th Congresses all provided for resale price maintenance contracts. All bills prohibited resale price maintenance contracts where monopoly existed. Only two[8] required the affixing of notice to the goods. Of the remaining bills, seven specified the filing of price lists with the Federal Trade Commission or the Secretary of the Department of Commerce.

---

1. Hearings on Trust Legislation, House Judiciary Committee, 63rd Congress, Parts 1 through 35.
2. See Page 298 et seq. this Appendix.
3. H. R. 13303 (63:2)
4. S. 5195 (63:2)
5. H. R. 13860 (63:2)
6. H. R. 3672, H. R. 4715, H. R. 9671, H. R. 13568; S. 3945, S. 5064, S. 5991 (64:1)
7. H. R. 44 and H. R. 212 in (65:1), H. R. 1702 (66:1), H. R. 14426 (66:2), H. R. 116 (67:1), H. R. 13494 (67:4), H. R. 6, 11, 5088 and 6531 (68:1).
8. H. R. 13494 (67:4) and H. R. 6 (68:1).

* Prepared by Anne Golden.

The eighth[9] had only one restriction: the right to promulgate resale price maintenance contracts was forbidden where a monopoly controlled prices. Contracts were to be negotiated individually. No uniform price among the contracts need prevail.

With the 69th Congress (1925-1927) there was a decided shift in the contents of the legislation. Anti-discrimination clauses were no longer included. Instead of prohibiting resale price maintenance contracts where monopolies existed, the use of contracts among manufacturers, or among retailers, or wholesalers, was prohibited. Clauses providing for the filing of price lists were eliminated entirely. The trend was toward legislation granting the right to contract for resale price, unencumbered by restrictions of price policy or operation.

Only one bill of the 30 bills presented in Congress from 1914 to 1933, bearing on resale price maintenance legislation ever got further than being "in Committee". This Bill, known as "H.R. 11", was passed in the House of Representatives on January 29, 1931. It required a producer to affix a notice to his product for the resale price contract to be enforceable. The products to be controlled by resale price maintenance contracts were greatly restricted. "No necessities of life as meat and meat products, flour and flour products, agricultural implements, tools of trade, canned fruits and vegetables, all clothing, shoes and hats could be controlled by contract."

Another bill eliminating these restrictions was introduced, but never passed.[10] This, commonly known as the "Capper-Kelly Fair Trade Act," became the model for later State Fair Trade Laws.[11] The Bill,[12] introduced in 1935, gave the producers of trade-marked goods the right to contract with subsequent vendees for the price at which they would sell his products without in any way controlling the action of the contractor.

Thus, starting with legislation designed to permit resale price maintenance agreements, but circumscribed by all the restraints then being advocated in the legislature, proposed resale price maintenance legislation had gradually shifted to a totally unencumbered freedom to enter into resale price contracts. The advent of the N.R.A. temporarily halted proposals in Congress. However, the experience under the codes resulted in renewed agitation for resale price maintenance enabling legislation.

This is current experience, and the terms of the proposed legislation are treated fully in the chapter on interplay of forces in the Drug Industry.[13]

---

9. H.R. 6531 (68:1)
10. H.R. 11 (72:1)
11. See page 285, et seq. Part IV
12. S. 299 (73:1)
13. See Part IV, Chapter II, page 294, et seq.
    The following pertinent bills were introduced since the 69th Congress: H.R.11 and S. 1443 in (69:1); H.R. 11 and S. 1418 in (70:1); H.R. 11 and S. 240 in (71:1); H.R. 11 (71:2); H.R. 11 (71:3); H.R. 11 (71:1); S. 299, S. 497, H.R. 3100 and H.R. 3677 (73:1)

THE CONNECTICUT RETAIL DRUG CONTROL ACT

An Act Providing for the Prevention of the Sale of Inferior Drug and Cosmetics Merchandise:

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. This act may be cited as the "Retail Drug Control Act." The following terms shall have the following meanings, when used in this act, unless the context otherwise indicates: (a) "Retail drug trade" shall mean the selling to the consumer, not for the purpose of resale, of any form of drugs, medicines, cosmetics, toilet preparations, drug sundries or allied articles, but shall not include the dispensing of drugs, medicines and medical supplies by a physician, dentist, surgeon, or veterinary in the legitimate practice of his profession; (b) "drug retailers" shall mean any individual, firm or corporation engaged wholly or partially in the retail drug trade; (c) "retail drug establishment" shall mean any store or department of a store engaged in the retail drug trade; (d) "drug" shall mean any substance or preparation, except soaps, intended for external or internal use in the cure, mitigation, treatment, remedy or prevention of disease or ailment in man or any other animal, and any substance or preparation intended to affect the structure or function of the body of man or any other animal, not including food but including medicinal or quasi-medicinal preparations; (e) "cosmetics" and "toilet preparations" shall mean toilet articles and perfumes, toilet waters, face powders, creams, lotions, rouges, shaving creams, dentifrices, bath salts and all other similar preparations and substances, except soaps, designed and intended for application to the person for the purpose of cleansing, improving or changing in any way the appearance of the person or of refreshing or preserving the person; (f) "drug sundries" shall mean such articles as are used in conjunction with, but not included in, drugs, cosmetics or toilet preparations.

SECTION 2. (a) No drug retailer shall use advertising whether printed, radio or display or of any other nature, which is intentionally inaccurate in any material particular or misrepresents merchandise, in respect to its use, trade-mark, grade, quality, quantity, size, origin, material, content or preparation; and no drug retailer shall use advertising or selling methods which tend to deceive or mislead the customer. (b) No drug retailer shall use advertising which refers inaccurately in any material particular to any competitor or his merchandise, prices, values, credit terms, policies or services. (c) No drug retailer shall use advertising which lays claim to a policy or a continuing practice of generally underselling competitors. (d) No drug retailer shall secretly give anything of value to a customer or to the employee or agent of a customer for the purpose of influencing a sale or, in furtherance of a sale, render a bill or statement of account to the employee, agent or customer which is inaccurate in any material particular.

(e) No drug retailer shall sell or offer for sale any merchandise upon a condition which involves a lottery, gamble, or other element of chance. (f) No drug retailer shall permit any demonstrator or sales employee whose salary is wholly or partially paid by a manufacturer or distributor to work in his establishment unless such demonstrator or sales employee is clearly and openly identified as the agent of such manufacturer or distributor.

SECTION 3. No drug retailer shall sell any drugs, medicines, cosmetics, toilet preparations or drug sundries at a price below the manufacturer's wholesale list price per dozen; nor, in the case of biologicals or other of the above mentioned products which are not customarily sold in dozens or greater lots, sell such products at less than the manufacturer's wholesale list price per unit. Notwithstanding the provisions of the preceding sentence, any drug retailer may sell at less than the prices specified above, imperfect or actually damaged merchandise or bona fide discontinued lines of merchandise, if advertised, marked and sold as such; merchandise sold upon the complete final liquidation of any business; merchandise sold or donated for charitable purposes or to unemployment relief agencies, and drugs or drug sundries sold to physicians, dentists, veterinarians or hospitals, but not for the purposes of resale by them.

SECTION 4. Any person responsible for a wilfull violation of the provisions of this act shall be fined not more than $500.

- Passed June 13, 1935

STATUS OF "FAIR TRADE" LEGISLATION

By States, as of Feb. 7, 1936

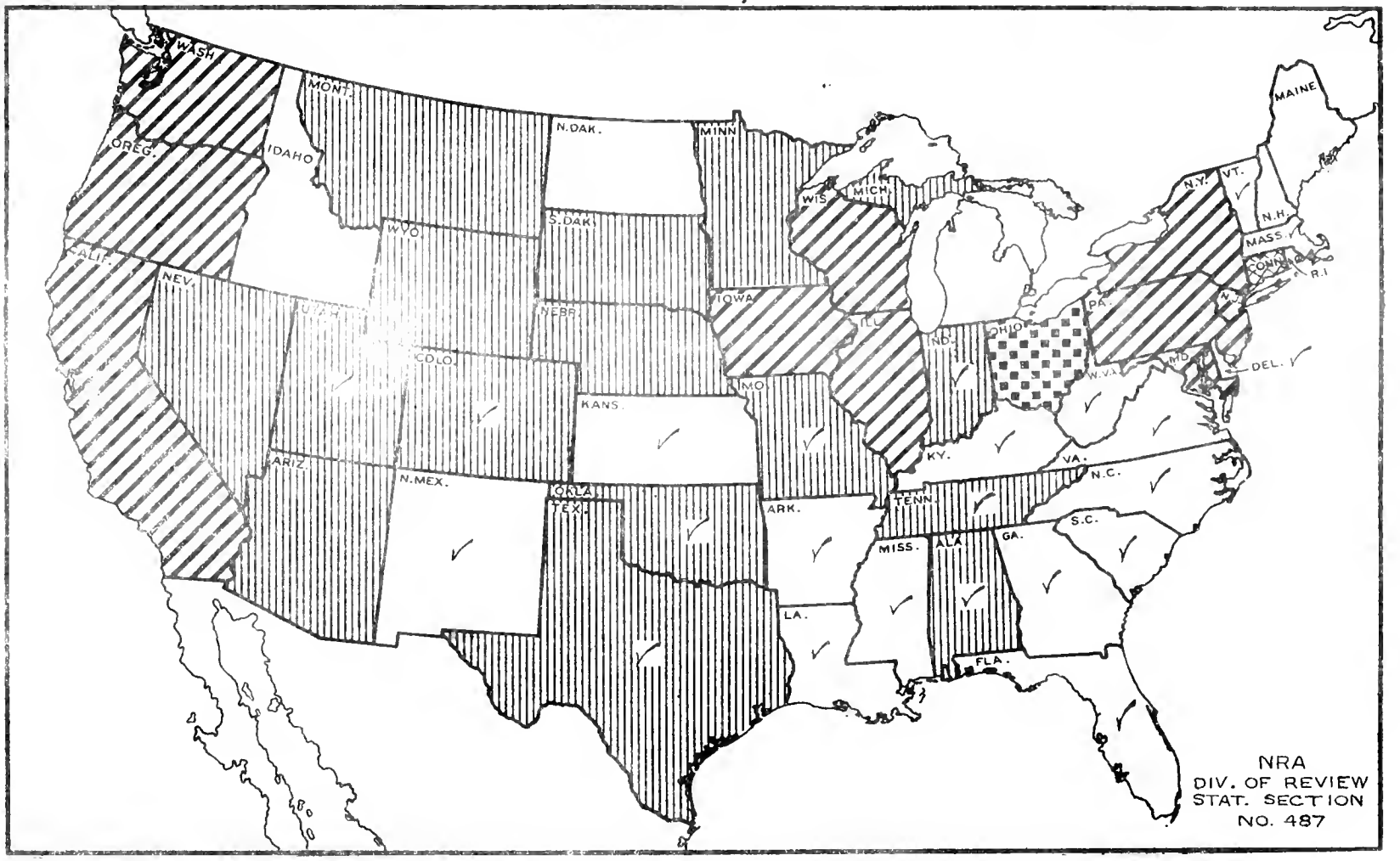
State	Date of Passage	Date Effective	Bill Pending	1935 Bill Dead	New Bill to be Presented	No Bill Presented
Alabama				x	x	
Arizona				x		
Arkansas					x	
California	Passed 1931; Amended - May, 1935	Amend. Eff. August 22, 1935				
Colorado				x	x	
Connecticut	Retail Drug Control Bill June 13	(1935) July 1		x		
Delaware					x	
Florida					x	
Georgia					x	
Idaho						x
Illinois	July 8, 1935	July 8, 1935				
Indiana				x	x	
Iowa	May, 1935					
Kansas					x	
Kentucky					x	
Louisiana					x	
Maine						No Data
Maryland	May 17, 1935					
Massachusetts					x	
Michigan				x		
Minnesota				x*		

*Fitch Control Plan. See page 379, this Appendix.

State	Date of Passage	Date Effective	Bill Pending	1935 Bill Dead	New Bill to be Presented	No Bill Presented
Mississippi						x
Missouri				x*	x	
Montana				x		
Nebraska				x		
Nevada				x		
New Hampshire						x
New Jersey	March 12, 1935	March 12, 1935				
New Mexico					x	
New York	May 17, 1935	May 17, 1935				
North Carolina					x	
North Dakota						x
Ohio			x			
Oklahoma				x	x	
Oregon	March 13, 1935					
Pennsylvania	June, 1935	June 6, 1935				
Rhode Island						x
South Carolina					x	
South Dakota				x		
Tennessee				x	x	
Texas				x	x	
Utah				x	x	
Vermont					x	
Washington	March 25, 1935	March 25, 1935	EFFECTIVE UNTIL JULY, 1937			
West Virginia					x	
Wisconsin	April, 1935					
Wyoming				x		

STATE "FAIR TRADE" LEGISLATION IN THE U. S.

FEB. 7, 1936



FAIR TRADE LAWS

RETAIL DRUG CONTROL LAW.

FAIR TRADE BILL TO BE PRESENTED AT NEXT LEGISLATURE

NO ACTION KNOWN

FAIR TRADE BILL PENDING

BILLS KILLED IN 1935

THE NEW JERSEY UNFAIR COMPETITION LAW

An Act to prevent unfair competition and unfair trade practices.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

SECTION 1. It shall be unlawful for any merchant, firm or corporation, (for the purpose of attracting trade for other goods,) (*) to appropriate for his or their own use (**) a name, brand, trade-mark, reputation or good will of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to the value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in the cases where said goods do not carry any notice prohibiting such practice, and excepting in case a receiver's sale, or a sale by a concern going out of business. (The notice prohibiting such practice shall contain a copy of this section and forbid the violation of any of its provisions.) (***)

SECTION 2. Any person, firm, or corporation violating this Act shall be liable at the suit of the maker of such branded or trade-marked goods, or any other injured person, to an injunction against such practices, and shall be liable to such suit for all damages directly or indirectly caused to the maker by such practices, which said damages may be increased threefold, in the discretion of the court.

SECTION 3. This law shall become effective immediately.

SECTION 225-1, 2, and 3. Compiled Laws of New Jersey, 1911-1924.

(*) The phrase enclosed in parentheses appeared in the law as passed April 1, 1913. (Chap. 210 Laws of New Jersey for 1913) On April 26, 1915, the statute was amended by the deletion of this phrase and by the addition of the sentence enclosed in parentheses.

(**) In the 1916 amendment the word "ends" of the 1913 Law, was replaced by the word, "use".

(***) The sentence enclosed in parentheses was added to the 1913 Law by the amendment of April 26, 1915, (Chap. 376 Laws of New Jersey for 1915), and deleted March 16, 1916 (Chap. 107 Laws of New Jersey for 1916). The law, as it now stands, is the one quoted above, after the portions enclosed in parentheses have been deleted from the text.

THE FITCH PLAN

The "Fitch Plan" proposed as a "Fair Trade Act" in Missouri and Minnesota, and voted down, is a plan under which contracts would not be necessary. Filing price lists with the Secretary of State of the State passing such an Act would constitute legal notice on all re-sellers. This proposed Act provides for damage suit by the manufacturer only.

An Act to Prevent Unfair Competition and Unfair Trade Practices

1. It shall be unlawful for any merchant, firm, association or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same by depreciating the value of such product in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods or products do not carry any notice prohibiting such practice, and except in case of a receiver's sale or a sale by a concern going out of business.

2. Every person, firm, association or corporation that has heretofore adopted or shall hereinafter adopt for their protection any label, trade-mark, brand or form of advertisement, and who shall have filed the same for record in the office of the Secretary of State, as provided by law in this State, may file with such label, trade-mark, brand or form of advertisement, a notice of the standard retail price at which any article or articles sold under such label, trade-mark, brand or form of advertisement shall be sold in the legitimate channels of retail trade. The filing of such notice shall constitute constructive notice to all persons of the standard retail price of such article or articles and the Secretary of State shall receive a fee of one dollar for the filing of such notice.

3. Any person, firm, association or corporation violating this Act shall be liable at the suit of the manufacturer of such branded, labeled, trade-marked or advertised goods, or any other injured person, to an injunction against such practice, and shall be liable in such suit for all damages directly or indirectly caused to the makers by such practices, which said damages may be increased threefold in the discretion of the court.

4. "Should any person, firm, association or corporation complying with the foregoing provisions of this Act, desire to change the standard retail price of any article or articles sold under such brand, label, trade-mark or form of advertisement, notice of such change shall be filed in the office of the Secretary of State in the same manner and upon payment in amount of same fees as in the case of the original filing of such notice."

PROPOSED TYDINGS BILL

"A BILL

To amend the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, is amended by striking out the period at the end of the first sentence thereof and inserting in lieu thereof a colon and the following: "Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for other conditions for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer of such commodity and which is in free and open competition with commodities of the same general class produced by others, when contracts or agreements of that description are lawful as applied to intra-state transactions, under any statute, law or public policy, now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is made, or to which the commodity is to be transported following such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September 26, 1914."

"Patman-Robinson Bill" -- 74th Congress -- 2nd Session. Senate.

TO AMEND ANTITRUST ACT

January 16 (calendar day, Feb. 3), 1936

Mr. Logan, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany S. 3154)

The Committee on the Judiciary, having had under consideration the bill (S. 3154) to amend section 2 of the act of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", report the same back with the recommendation that the bill be amended as follows, and that, as so amended, it do pass.

Amendment: Beginning with the words "Sec. 2", in line 3, page 2, of the printed bill, strike out all thereafter, and insert, in lieu of the language stricken out, the following:

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price or terms of sale between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such distrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; nor differentials which make only due allowance for differences in the cost, other than brokerage, of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

(b) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction, or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(c) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless--

(1) such payment or consideration is offered on proportionally equal terms to all other customers competing in the distribution of such products or commodities; or unless

(2) the business, identity, or interests of such customer are in no way publicly associated, by name, reference, allusion, proximity, or otherwise, with or in the furnishing of such services or facilities, and the consideration paid therefor does not exceed the fair value of such services or facilities in the localities where furnished.

(d) For purposes of suit under section 4 of this Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved in such violation; limited, however--

(1) Under subsections (a) and (b) above, by the volume of plaintiff's business in the goods concerned, and for the period of time concerned, in such violation;

(2) Under subsection (c) above, to the amount or share, or its pecuniary equivalent, to which plantiff would have been entitled if the payment concerned in such violation had been made or offered in accordance with paragraph (1) of said subsection (c).

NEW N.A.R.D. MODEL STATE FAIR TRADE ACT
Draft of January 29, 1936
A BILL ENTITLED

An Act to protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, by legalizing voluntary contracts establishing minimum resale prices and refusal to sell unless such minimum resale prices are observed.

1. The following terms, as used in this Act, are hereby defined as follows:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, man-facturer or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person selling a commodity at retail.

(E) "Resale" means any sale made in the State of (NAME OF STATE WHERE ACT IS TO BE PASSED) or in any other State, Territory or the District of Columbia, where contracts made lawful by this Act are valid, by a wholesaler or a retailer, and "to resell" means to make a "resale" as herein defined.

2. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer of such commodity and which is in free and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of (NAME OF STATE WHERE ACT IS TO BE PASSED) by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the vendor.

(B) That the vendor will not sell such commodity:

(1) to any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same at less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) to any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

3. No contract containing the provisions enumerated in Section 2 hereof shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owners' stock for the purpose of discontinuing dealing in any such commodity, provided the owner of such stock shall give to the producer of such commodity prompt and reasonable

notice in writing of his intention to close out said stock.

(B) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(C) By any officer acting under an order of court.

4. An Action at law or suit in equity may be brought by any person damaged by: (a) the breach or (b) the procurement of the breach or (c) the interference with the carrying out, of any contract entered into in pursuance of this Act, or (d) any other act whereby a party to such contract is deprived of the benefits therefrom.

5. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices; provided, however, that when a commodity is distributed by mote than one wholesaler, or more than one retailer, each of said wholesalers or of said retailers amy make or be a party to contracts stipulating minimum resale prices established by the producer of such commodity as provided by this Act.

6. This Act may be known and cited as the "Fair Trade Act."

7. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected hereby.

From DRUG TRADE NEWS

January 6, 1936.

MANUFACTURERS WORKING UNDER FAIR TRADE

This list shows which manufacturers in the drug field are now operating under state fair trade laws and in which states, indicated by the symbol (x). This list also shows which manufacturers are planning to operate under the different state laws, indicated by the symbol (#). This list is by no means complete. Only large companies or organizations doing a nationwise business are listed.

Because of rapid developments, this tabulation is subject to change without notice. Manufacturers who wish to indicate a change in their status from what is shown here, and manufacturers who are not included in the list but who wish to be listed should write immediately to Drug Trade News. Operations by manufacturers under wholesalers' omnibus contracts are also included.

	Cal.	Ill.	Iowa	Md.	N.J.	N.Y.	Ore.	Pa.	Wash.	Wis.
Abbott.....	x	#		#	x	x	#	#	x	
Admiracion.....	x									
Agfa-Ansco.....	x					#				
Amer.Clinical.....					x	#				
A. D. S.....	x	#	#	#	#	x	#	#	x	x
Am. Hard Rubber...	x									
Am. Safety Razor..	x	#	#	#	#	x	#	#	#	#
Amity Leather.....	x						#		#	
Armand.....	x	x	#		x	x	#	x	x	x
Arzen.....	x								x	
Harriett H. Ayer..						x				
Bauer & Black.....	x	x			x	x	#	x	x	x
Bayer.....	x									
Beechams.....	x									
Bourjois.....	x				x	x				
Boyer.....	x									
Bristol-Myers.....	x				x					
Burroughs-Wellcome						x		x		
Canada Dry.....	x									
Certane.....	x						x		x	
Chamberlain.....	x		x						#	
Chichester.....	x						#		#	
Colgate.....	x	x			x	x		x	x	x
Cooper & Cooper...	x	x			x	x		x		
Coty.....	x				x	x				
Crazy Water Crys..	x									
Creomulsion.....	x								x	
Davis Eucalyptus..	x	#	#	#	#	#	#	#	#	#
Davol.....	x							x		
Denver Mud.....	x	x	x				x		x	

From Drug Trade News, Jan. 8, 1936.
Manufacturers Certain Under Fair Trade (Cont.)

	Cal.	Ill.	Iowa	Md.	N.J.	N.Y.	Ore.	Pa.	Wash.	Wis.
DeVilbiss	x	x	x	x	x	x	x	x	x	x
Durham Duplex	x									
Elno	x								x	
Emerson Drug	x	x		x	x	x	x		x	x
Enders Razor	x									
Eno's	x					x	x		x	
Epsa	x						x		x	
Ever Dry	x						x		x	
Ex-Lax	x	x			x	x	x	x	x	
Max Factor	x								x	
Feminine Products	x									
Fitch	x								x	
Fougera	x									
French Lick Spgs	x	x	x							
Frostilla	x									
Garfield Tea								x	x	
Gillette	x	x	x	x	x	x	x	x	x	x
Glaser Bros	x						x		x	
Glazo	x									
Glessner	x	x	x			x	x	x	x	x
Glo-Co									x	
Gold Medal	x									
Healthaids					x					
Health Products	x	x	x	x	x	x	x	x	x	x
Herbicide	x									
Houdaigant					x	x				
L. Grif ith Hughes	x								x	
Ingersoll-Watch	x							x		
Innerclean	x						x		x	
International Labs	x								x	
International Vitamin						x				
Infant	x									
Walter Janvier	x	x	x	x	x	x	x	x	x	x
Jarvis Sales	x									
Johnson & Johnson	x	x	x	x	x	x	x	x	x	x
Khon-Tanten	x									
Kondon	x	x	x					x	x	
Lambert	x	x			x	x	x	x	x	
Lanteen	x	x	x	x	x	x	x	x	x	x
Lavoris	x									
Lederle	x									
Lehn & Fink	x				x	x				
Lentheric	x									
Eli Lilly	x	x	x	x	x	x	x	x	x	x
Lockwood Brackett						x				
Lucky Tiger	x									
George W. Luft	x									
Magazine Repeating	x									
Marinesia	x						x		x	
Marion Lambert	x								x	

From Drug Trade News, Jan. 6, 1936.
Manufacturers Working Under Fair Trade (Cont.)

	Cal.	Ill.	Iowa	Md.	N.J.	N.Y.	Ore.	Pa.	Wash.	Wis.
McCoy's Labs.....	x									
McKesson.....	x	x	#	#	x	x	x	x	x	#
Mead Johnson.....	x	#	#	#	#	x	#	x	#	#
Mennen.....	x	#	#	#	#	#	#	#	#	#
Mentholatum.....	x									
Wm. S. Merrell.....	#	x	#	#	x	x	#	#	#	#
Micky Malto.....	x									
Dr. Miles.....	x	x	x	x	x	x	x	x	x	x
Moon Glow.....	x						#		x	
Murine.....	x	x					x		x	
Nat'l Pharmacal.....	x									
No-Doz Labs.....	x						#		#	
Northam-Warren.....	x	x	#	#	x	x	#	#	#	x
Norwich.....	x	#	#	#	#	x	x	x	x	x
Noxzema.....	x	x				#	#		#	
Omega Oil.....	x									
Page & Shaw.....	x								x	
Paris Medicine.....	x									
Parke-Davis.....	x	#	#	#	#	x	#	#	x	#
Park & Park.....	x									
Park & Tilford.....	x	#	#	#	#	x	#	#	#	#
Parker Pen.....	x									
Parrott.....	x									
Partola.....	x						#		#	
E. L. Patch.....	#	#	#	x	x	x	#	x	#	#
Pepsodent.....	x	#	#	#	x	x	x	x	x	#
Dr. Pierre.....	x						#		#	
Pinaud.....	x				x	x				
Pineoleum.....	x	x			x	x	x	x	x	
Pinex.....	x								#	x
Padre.....	x									
Poloris.....	x				x	x		x		
Pompeian.....	#	x	#	#	#	x	#	x	x	x
Potter & Moore.....	x								x	
Prophylactic.....	x				x	x	#	x	x	
Princess Pat.....	x	#	#	#	#	#	#	#	#	#
Q-T. Labs.....	x						#		#	
Rem.....	x	#	#	x	#	x	#	x	#	x
Rieser.....						x				
Sanitube.....	x									
R. Schiffmann Co....	x									
Julius Schmid.....	x	x	x	x	x	x	x	#	x	x
Schnefel.....	x									
Scholl.....	x	x		x	x	x	#	x	x	x
Scientific Labs.....	x						x		x	
Scott & Browne.....	x	#	#	#	x	x	#	x	x	x
Seabury & Johnson...	x									
Seeck & Kade.....	x	x	#	#	x	x	x	#	x	x
Sharpe & Dohme.....	x				x	x	#	x	x	x

From Drug Trade News, Jan. 6, 1936.
Manufacturers Working Under Fair Trade (Cont.)

	Cal.	Ill.	Iowa	Md.	N.J.	N.Y.	Ore.	Pa.	Wash.	Wis.
Soda Lax.....	x									
Squibb.....	x	#	#	#	x	x	x	#	x	#
Fred. Stearns.....	x									
Sterilastic.....	x									
Strasska Labs.....	x						#		#	
Tampax Sales.....	x		#				#		#	
Tattoo.....	x									
Thymo Borine.....	x									
Upjohn.....	x	#	#	#	#	x	x	#	x	x
Valvoline.....	x						x		x	
Vantine.....	x									
Vapo-Cresolene.....	x				x		x		x	
Virginia Dare.....	x						#		#	
Vivaudou.....	x	#	#	#	#	x	#	#	#	#
H. K. Wampole.....	x	x	#	#	x	x	x	x	x	x
Wm. R. Warner.....	x	#	#	#	#	x	#	#	x	#
Weco Products.....	x	x			#	x	#	x	x	x
D. Weeks.....	x								#	
Western Clock.....	x				x	#				
Wildroot.....	x						#		#	
J. B. Williams.....	x									
G. F. Willis.....	x									
Wix.....	x									
John Wyeth.....	x					x		#	x	
World's Dispens....	x					x		x	x	
Yardley.....	x				x	x				
Youngs Rubber.....	x	x	x	x	x	x	x	x	x	x

TECHNIQUES (*)

Price Information Available From Newspaper Advertisements

Data on prices prevailing just before the introduction of a system of retail price regulation, and at some time during its operation are inadequate for an understanding of the effects of such regulation on the price structure. Prices change rapidly in retailing, and may fluctuate considerably even when subject to control. Answers to questionnaires could not be expected to provide a record of price movements. Most retailers keep practically no price records, and even among large organizations elaborate statistical systems are a rarity. Retailers answering even so limited a question as that requesting the prices they charged before code operation and at the time they send in their replies, would be guessing

(*) Prepared by H. S. Kantor and Anne Golden

at most of the past prices.

Large retailers, such as chains, advertise their prices in newspapers. The device of constructing price series from newspaper files was therefore selected as a method worth testing. Such prices, though inadequate, are at least accurate. Naturally, the items advertised are frequently changed so that the price record made available by this method is incomplete. These items, however, are likely to be of considerable importance in price competition. A sample study of price movements was therefore undertaken in connection with the present account of the loss limitation provision in the retail drug trade.

Two cities were selected for this experiment. The advertising retailers were two chain stores, one of which operated in both cities. The chain which operated in only one of the cities was generally regarded as the price leader in that city; the other chain set prices in the second city. Additional reasons for the selection were the fact that one of the chains maintains records of prices and sales volume, so that there was the possibility of combining price data with information on quantities sold, and also the fact that code compliance broke down in one of the cities.

The first stage of the test consisted of an analysis of advertisements by one of the companies for the 1st Sunday of each month for the twenty-one months, January, 1934 through September, 1935. A count of the number of items advertised and the total space used in each issue showed considerable variation in both, and in the space per item. These variations do not show any trend or relationship beyond the fact that during the period of intensive price competition less space was allotted each advertised item. The actual space used in an advertisement cannot separately be considered a significant index of advertising policy since line rates were contingent upon monthly quotas and all the Sunday advertisements were in one newspaper. Average space per item varied with the character of the advertising copy: emphasis on price usually meant small average space per item, emphasis on use of the product usually involved more space per item. Further analysis of the number of items advertised yeilded results bearing on the shift in kinds of items advertised under varying conditions. The items were separated according to the codes governing their retail sale. Chart A, Series II shows the number of drug, tobacco, grocery and "all other" items advertised in each issue analyzed. It is interesting to note that when compliance with the drug code broke down and a price war developed, the number of drug items advertised decreased, and tobacco items increased sharply both in absolute numbers and as a percentage of the total. During this period the breakdown of drug items showed that standard brands were featured to a much greater extent than before.

Chart B, Series II shows the number of "standard", "household" and "private" brands as a percentage of total drug items in each issue. "Standard brand" was defined as a product which was advertised by the manufacturer and/or primary distributor at least in the area of operation, and which was available to independent, chain and department store competitors of the organization whose prices were being analyzed. "Private brand" items were defined as an item the trade-name,

formula, or label of which was owned by the establishment whose prices were being advertised, and which were not available to non-agency competitors in the marketing area. These included brands controlled either independently by the establishment whose prices were being studied - or jointly, but restricted solely to its outlets in the market area. In drugs, etc., "private brand" was further subdivided into "H" Brands and "P" brands. "H" brands are items, sold under the private label (as defined) of the seller, for which there are no common nationally known brands. These are primarily U.S.P. and National Formulary items except aspirin and milk of magnesia which are considered "P" brands since there are so many competitive brands. "P" brands contain all other private brand items.

While the company advertised its private and household brands extensively during periods of ordinary competition, it concentrated heavily on the better known products -- the nationally advertised brands -- during the price war.

An attempt to construct price series from the advertisements of this chain store on the last Sunday of each month yielded no usuable results. Seventy-five items appeared five times or more in the twenty-one months covered and only one of these was a standard brand item under the drug code. A comparison of the two chains could not be made on the basis of one advertisement from each month. The procedure followed was therefore changed. The reports of Merchandising Facts, Inc. were consulted in an effort to select the items most frequently sold by retail drug stores. A list of thirty fast moving items was built from this group, by using twenty-five standard brands, adding one standard brand cosmetic, and four private brands of the most popular private brand articles, namely, aspirin, oral antiseptics and cod liver oil, and cleansing tissue. All newspaper advertisements in both cities were searched for prices of these items: daily and Sunday advertisements of both chains in all the local newspapers were used. The prices of only a few of the items were charted, but the charts prepared indicate the types of information that can be derived from the technique tested. The material can be analyzed to show the following:

1. Change in level of advertised prices on standard and other brands when the loss limitation provision went into effect.

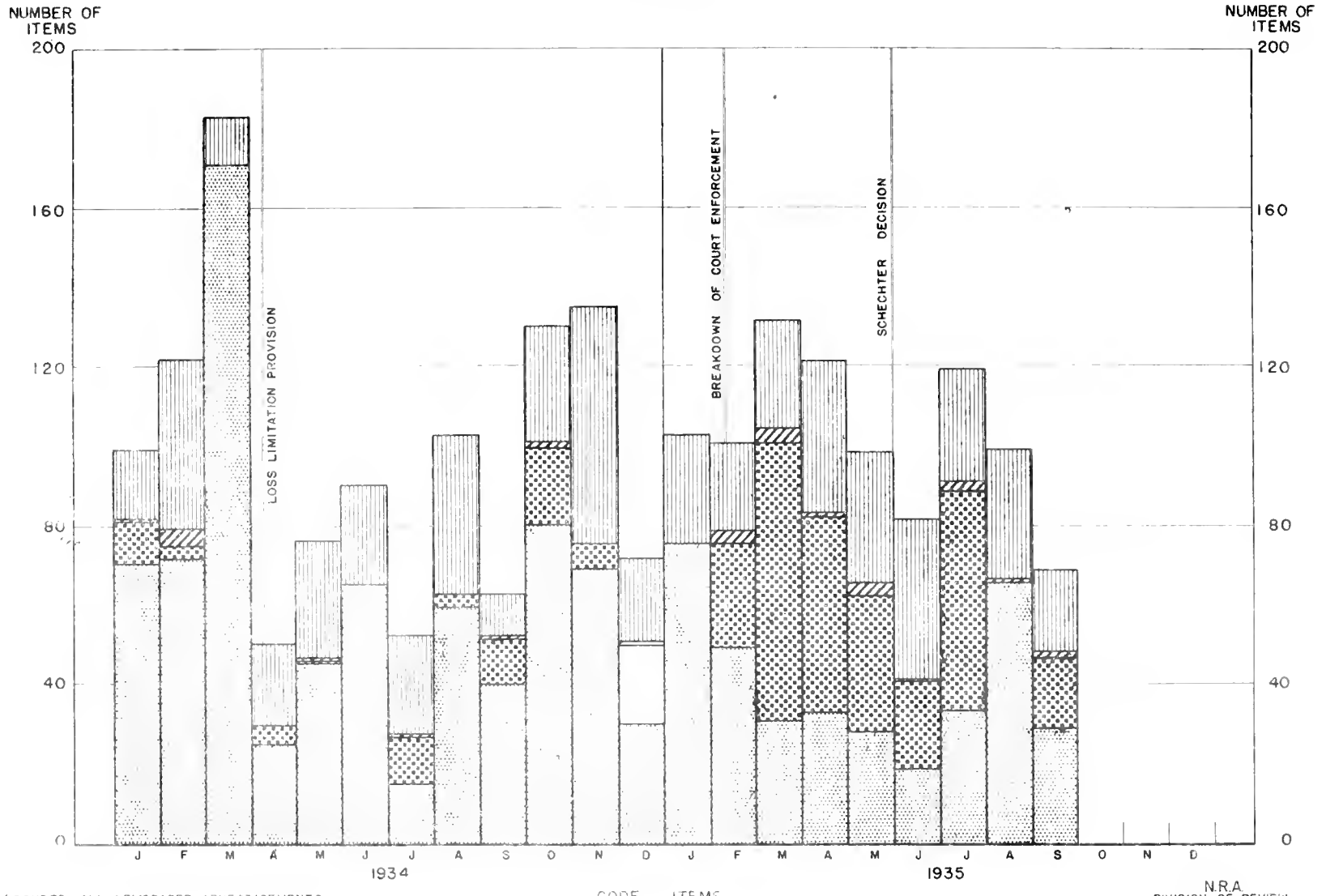
No change is shown in the sample, but this cannot be taken as conclusive evidence. The intent in this work was to see what types of conclusion could be reached. A much more comprehensive analysis would be necessary before generalizations could be made.

2. Relationship between manufacturers' suggested prices and the prices advertised.

An interesting contrast is illustrated in Chart C, Series II. This chart shows the prices advertised on two standard brands of oral antiseptic in the city in which the two chains compete. The manufacturer of one of the brands maintains a strict policy of refusal-

ANALYSIS BY TYPE OF CODE OF 2095 ITEMS

1934-1935



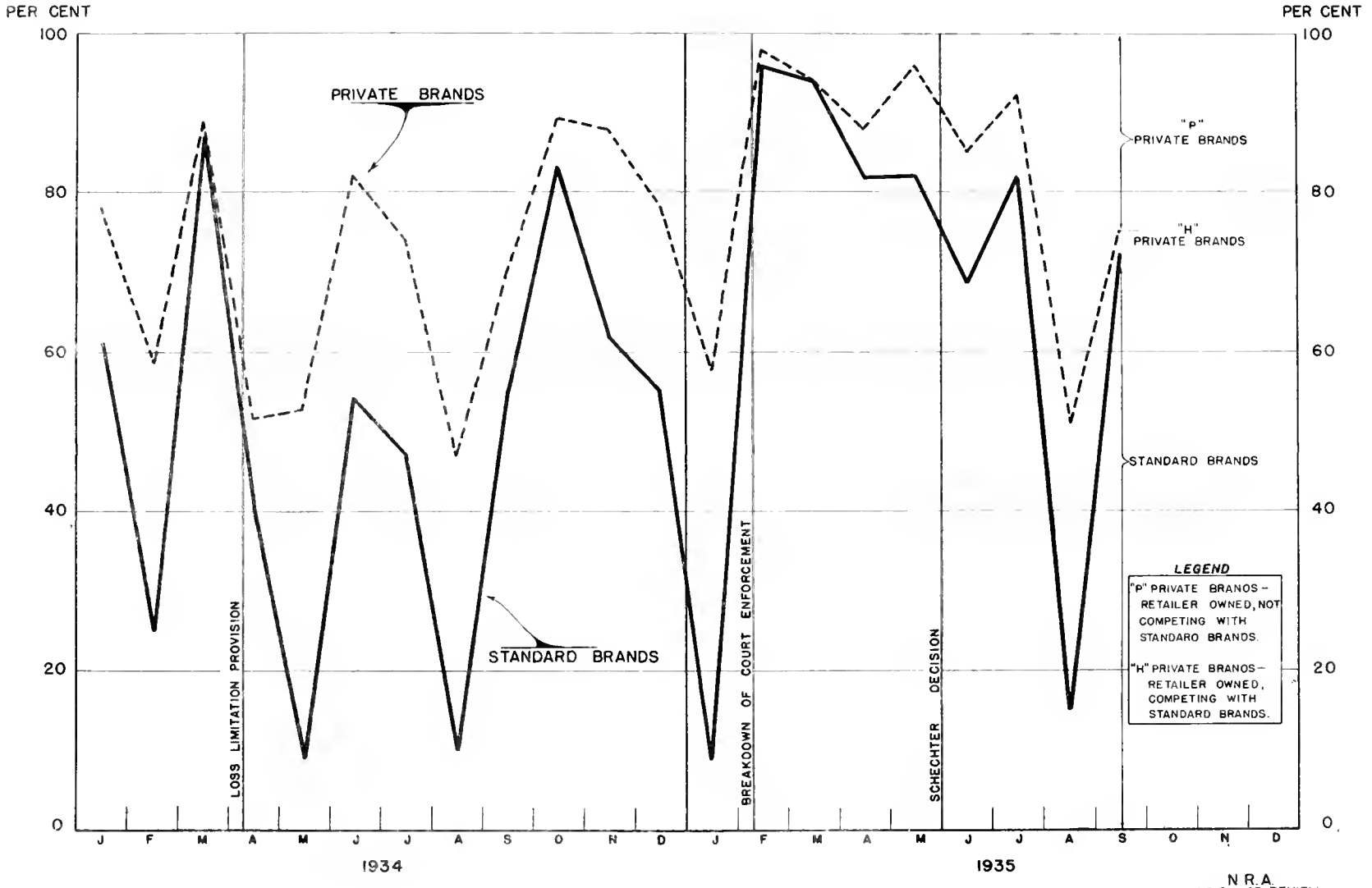
*SOURCE: ALL NEWSPAPER ADVERTISEMENTS BETWEEN JAN 1, 1934 AND OCT 15, 1935

N.R.A.
DIVISION OF REVIEW
STATISTICS SECTION
NO. 488

SERIES II
A

ANALYSIS BY TYPE OF BRAND OF THE 1108 DRUG ITEMS

1934-1935



SOURCE: TABULATION OF NEWSPAPER ADVERTISEMENTS.

N.R.A.
DIVISION OF REVIEW
STATISTICS SECTION
NO. 492

to-sell to price cutters, the other manufacturer does not. The advertised price of the price-stabilized item was cut below the manufacturer's suggested price only once by each of the chains. At all other times, including the period of severe price cutting when code compliance broke down -- the price suggested by the manufacturer was the only one advertised. The suggested price for the non-stabilized item was 79¢ and for the other 59¢. At the end of September, 1934, price competition between the two chains on the higher priced antiseptic started a decline in its price which brought it down from 79; to the code minimum - 67¢ - in January, 1935; to the price of the other antiseptic - 59¢ - in February, 1935: and finally below the code minimum of the stabilized product - 50¢ - in March, 1935. The product is a popular one and highly suitable for competitive pricing. The other antiseptic would no doubt be equally suitable and would probably have had a similar price history in this period if the manufacturer were not known to be very firm in refusing to sell to price cutters. In fact the manufacturer's strict policy was the result of years of strenuous "foot balling" of his product when the retail price was $1.00. When the minimum price policy was inaugurated, the full retail price was reduced to 75;, thereby bringing the list price down from 67¢ to 50¢.

Additional points of interest in charts of this type are: frequency of price advertising of an item; in relation to the price change in it and initiation of price cuts in a competitive situation. The two chains under consideration alternated to a considerable extent in initiating price cuts. The manager of one of the chains stated that it was the policy of his company to follow the price cut of the other chain in that city; it is possible that the response to a cut initiated by the other chain was a larger cut rather than one exactly equal to it.

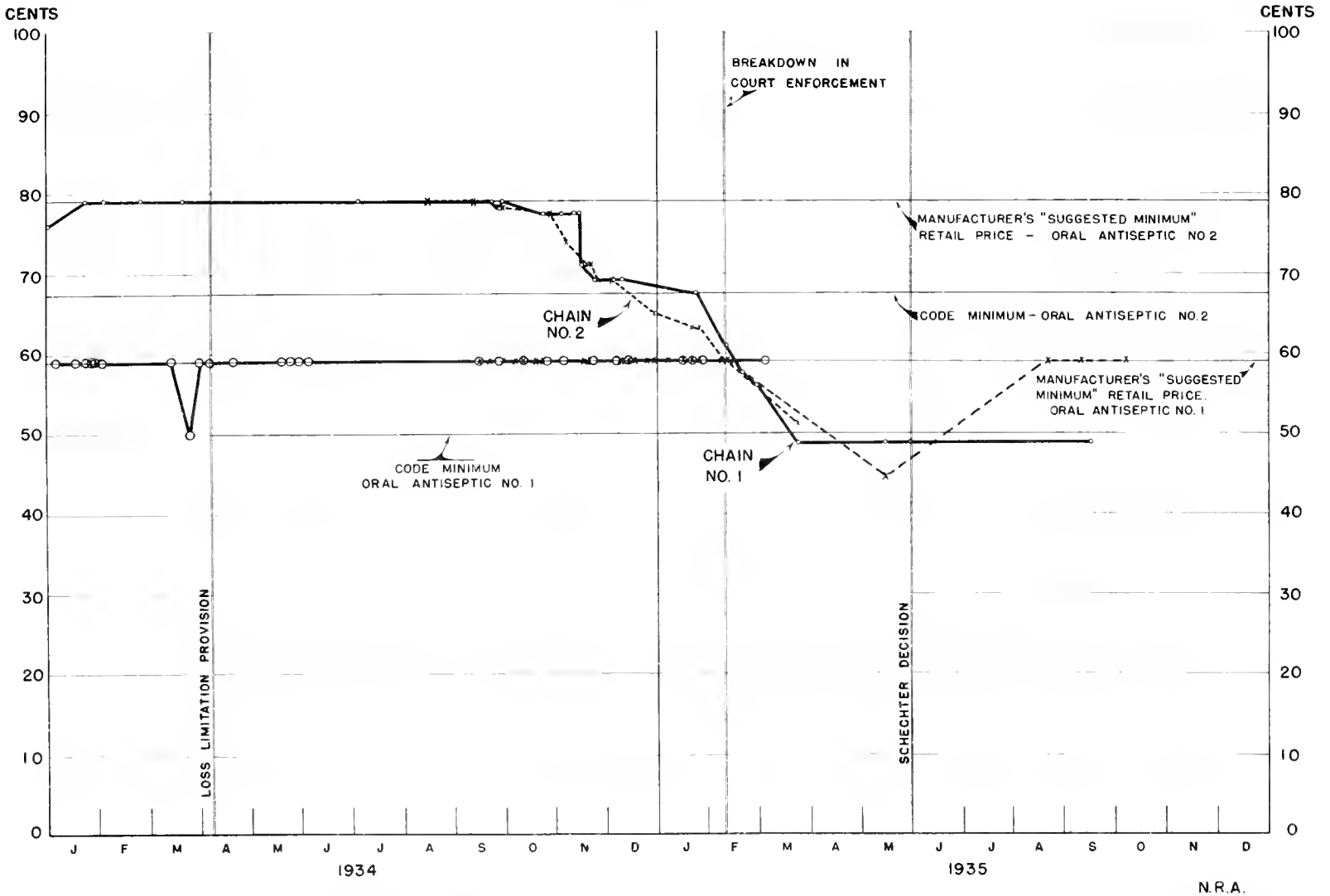
It may seem curious that both chains continued to advertise the stabilized item. The explanation may be very simple -- it may be a service rendered by the chains and paid for in an advertising allowance. The almost absolute fixity of price on this product during a period of turbulent price movements suggests that refusal-to-sell, a method of price regulation permitted be existing federal law, may be an effective method for manufacturer's control over retail price. Hasty generalizations should not be made on this point. The two chains covered in the sample study are the price leaders in the city. They advertise in the newspapers regularly and it is comparatively easy to keep track of their advertised prices. Handbill or simply window-display advertising by small but aggressive price-cutters in a more complex market would present a far more difficult, and probably an impracticable task of price maintenance supported only by refusal-to-sell.

3. Relationship between code minima and advertised prices.

Some of the advertised prices showed a tendency to drop towards the code minima of the respective products, others did not. While no positive conclusion can be made on so small a study, the negative conclusion is permissible: in a comparatively simple competitive situa-

EFFECT OF COMPETITION BETWEEN TWO RETAIL DRUG CHAINS ON COMPETING PRODUCTS CONTROLLED BY DIFFERING MANUFACTURER POLICIES

1934–1935



SOURCE: ALL ADVERTISEMENTS OF THE TWO CHAINS APPEARING IN TWO NEWSPAPERS OF CITY NO 1 BETWEEN JAN. 1, 1934 AND OCT 15, 1935.

N.R.A.
DIVISION OF REVIEW
STATISTICS SECTION
NO 485

SERIES II
C

tion, not all of the products governed by the loss limitation provision, and suitable for leader selling, were priced at the code minimum. Code minima are shown on each of the price charts presented; no separate exhibits showing this relationship are included. It is to be remembered that the code minima applied only to the standard brands.

4. Competition between standard brands in the same store.

Charts D and E, Series II, show the price movements of two pairs of competing standard brands in one of the chains. The two items in Chart D had the same code minimum price. The advertised prices of these two items stayed above the code minimum until October, 1934 and fell below during the price war early in 1935. One of the items was much more stable in price than the other. The item that fluctuated more freely, often sold a little above the other in price. The prices were identical on a number of occasions. During the early part of 1935 the two items tended to sell at the same price, with variations of both items: sometimes one was lower priced and sometimes the other.

Chart E shows two competitive items with different code minima. The products were advertised at the same price, however, during the period of normal price competition. This price was 5¢ above the higher of the two code minima. During the price war both items fell below the lower of the two code prices. A three cent differential existed between the new prices - the item with the lower code minimum selling at the higher price.

Information developed in this way can yield useful results with regard to the competitive pricing of groups of products that can be substituted for each other readily. Individual differences may be afftected by the selection of one or another of the group as a weapon in a strategic move. The similarity of their price fluctuations suggests the possibility of a simplification in the enormously complex problem of price analysis of retail trade, in that groups of products may be represented by selected items in the groups.

5. Competition between the two chains.

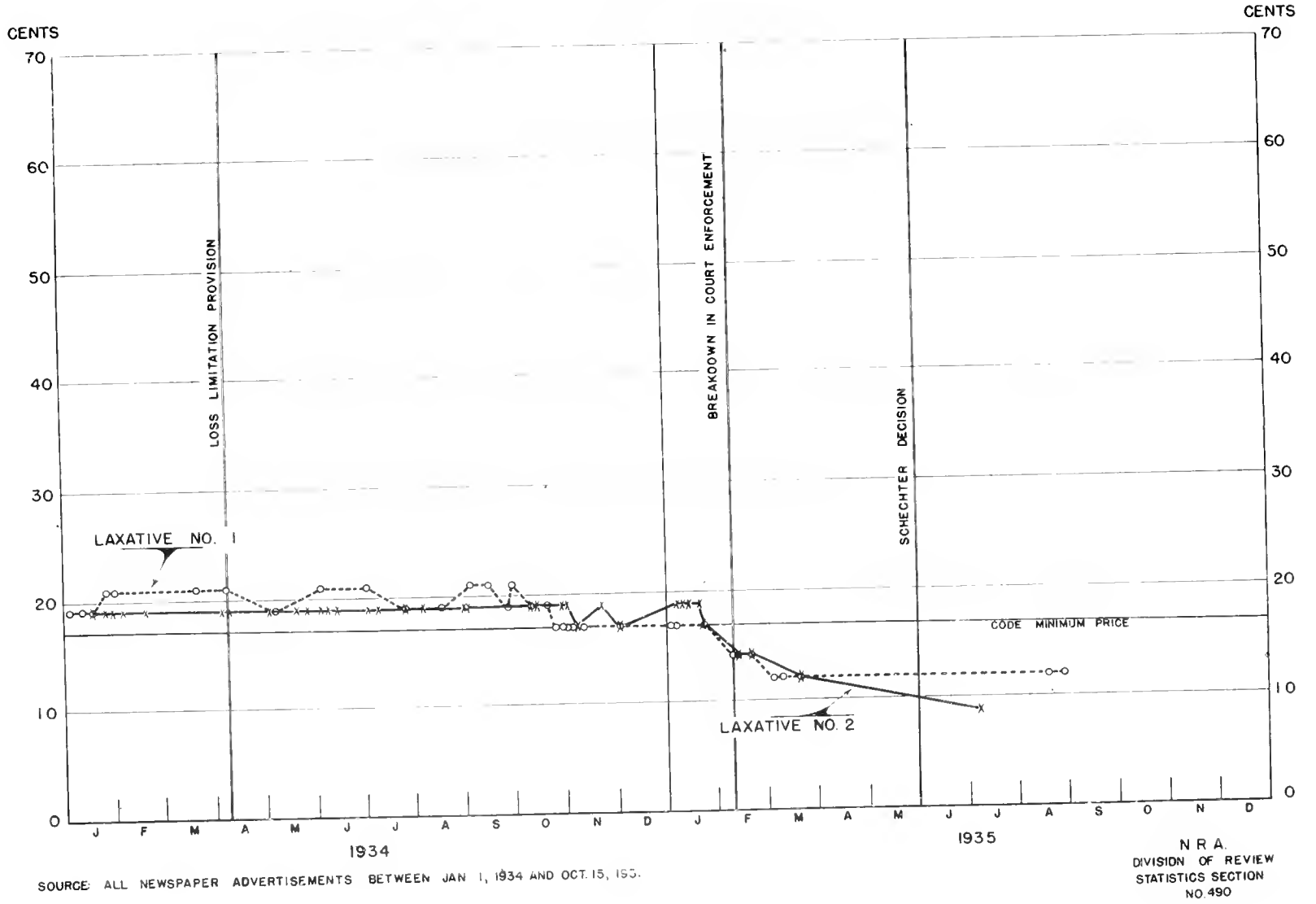
Chart F shows the price movements of standard and private brands of a product sold by both chains. One of the chains sells two lines of private brand -- a "quality brand" and a "fighting brand." The other sells the standard brand and a private "fighting brand." The competitive prices at each level are very closely in line with each other. They follow the same trend with sometimes one company and sometimes the other taking the leadership in a price move. It is interesting to observe that the company with the intermediate line -- the "private quality brand" kept the price of that brand fairly stable, in spite of sharp changes in the higher and lower priced lines.

6. Competition between Standard and Private brands within a Store.

Chart G shows advertised prices of standard and private brands of a product sold by one chain in a city in which that chain is the price leader. The standard brand was advertised at exactly the same price throughout the period; the fighting brand price varied somewhat; the

RETAIL PRICES TWO COMPETING LAXATIVES IN ONE CHAIN IN SAME CITY

1934-1935



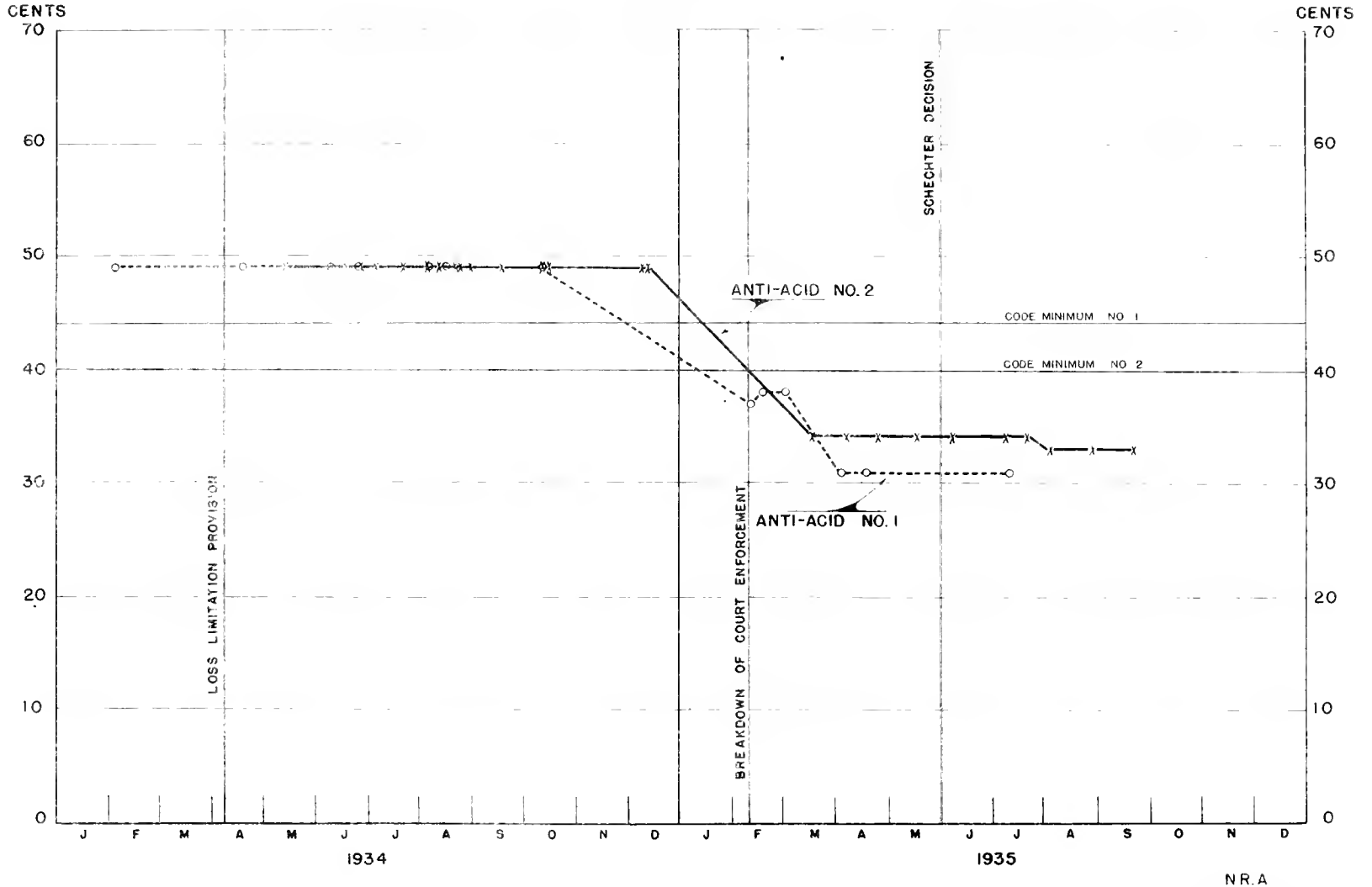
SOURCE: ALL NEWSPAPER ADVERTISEMENTS BETWEEN JAN 1, 1934 AND OCT. 15, 193.

N R A.
DIVISION OF REVIEW
STATISTICS SECTION
NO. 490

SERIES II
D

RETAIL PRICES OF TWO COMPETING ANTI-ACIDS IN ONE CHAIN IN SAME CITY

1934-1935



SOURCE ALL NEWSPAPER ADVERTISEMENTS BETWEEN JAN 1, 1934 AND OCT 15, 1935.

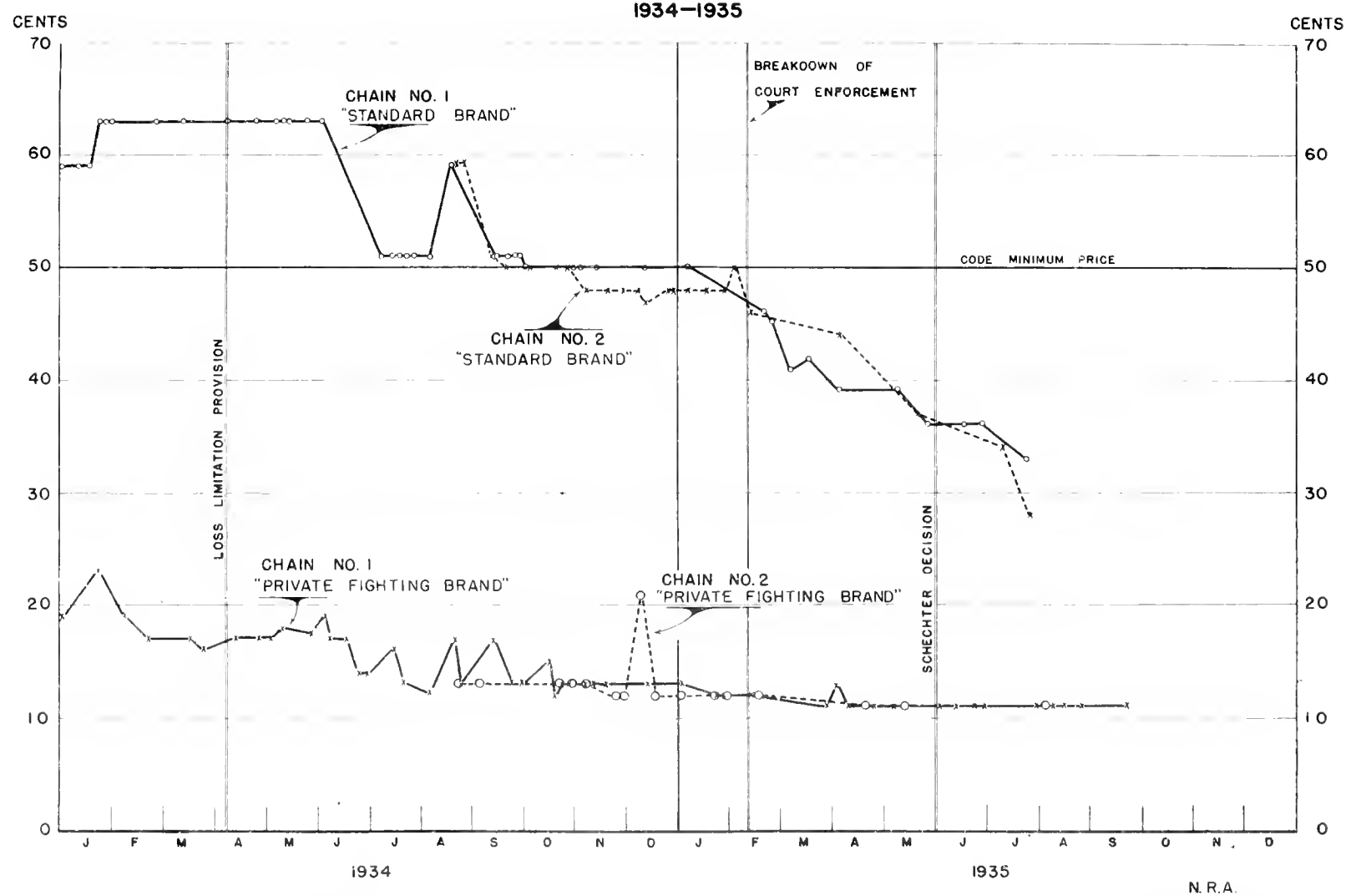
N.R.A.
DIVISION OF REVIEW
STATISTICS SECTION
NO 491

SERIES II
E

ADVERTISED SALES PRICES OF ONE STANDARD BRAND AND TWO COMPETING PRIVATE BRANDS OF ASPIRIN OF TWO CHAINS IN THE SAME CITY.

CITY NO. 1

1934—1935



SOURCE. ALL NEWSPAPER ADVERTISEMENTS BETWEEN JAN. 1, 1934 AND OCT 15, 1935

NOTE. BOTTLES OF 100 (5 GRAINS EACH)

N. R. A.
DIVISION OF REVIEW
STATISTICS SECTION
NO. 486

SERIES II
F

largest price movements were those of the quality private brand. The less severe competition encountered by the advertising chain in this city probably accounts for the stability of the standard brand; the likelihood that the quality private brand afforded a much better margin than the fighting brand may be suggested as the explanation of the fact that efforts were made to attract attention to that item.

SHORTCOMINGS OF THE METHOD

1. The construction of price series from newspaper advertisements is rendered difficult by the fact that of the thousands of items sold in a drug store (and other retail outlets), there are hundreds which are suitable for price advertising. Items are therefore rotated in the advertising. Some of the choices are made for definite strategic reasons, others are merely the random selection of items that have not been featured recently. Large and irregular gaps in the price series are the result.

2. Prices advertised in newspapers do not constitute a continuous series. There is no way of knowing what the prices were in between any two advertisements. Some advertising retailers may have a definite policy of maintaining a price cut only on the day it is advertised, the price reverting to the prior level the next day. Fixed policy of that sort is probably rare. It is much more likely that the duration of an advertised price after the advertisement is withdrawn varies with current competitive conditions.

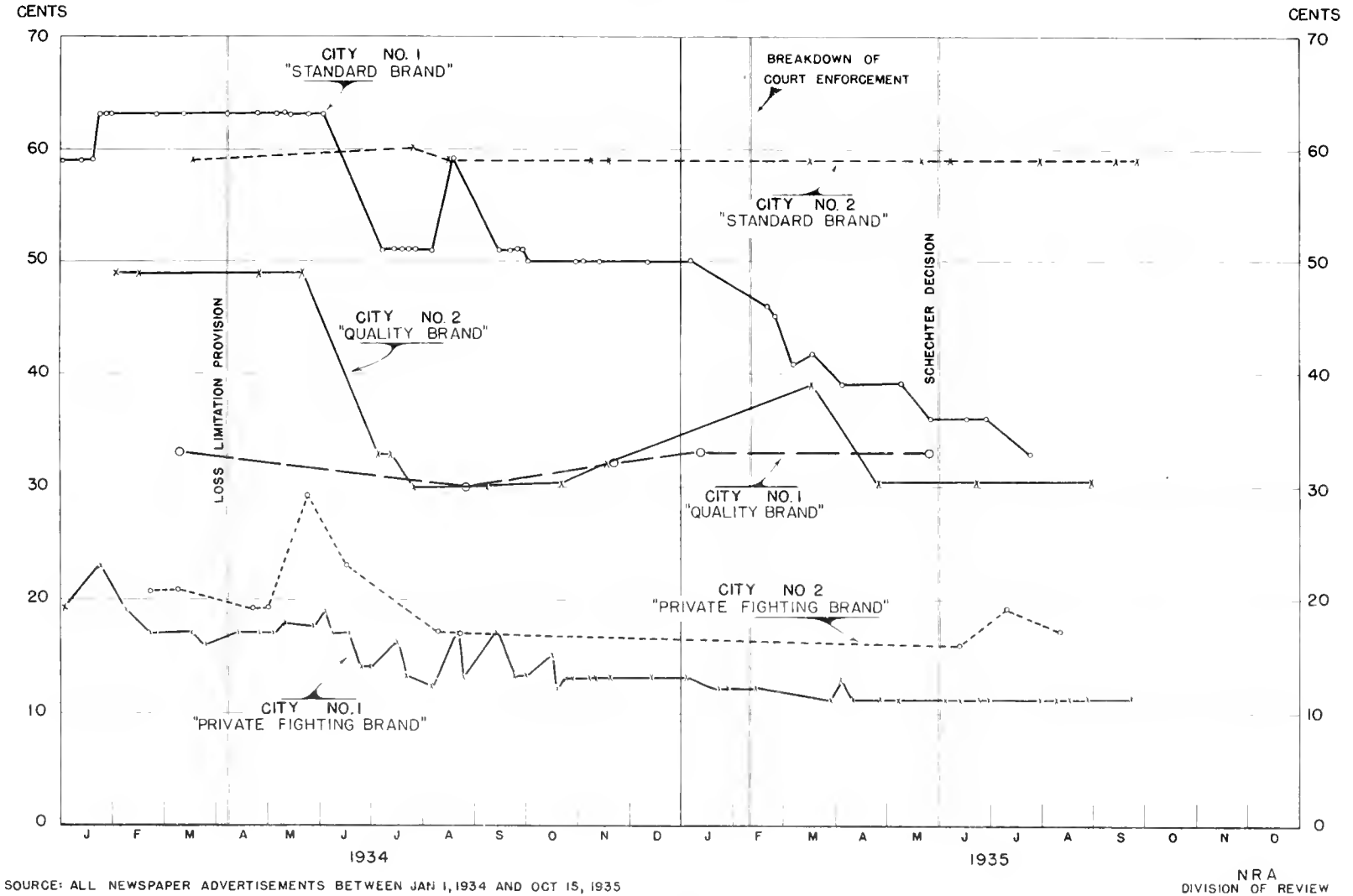
3. Many price cuts are made without their being advertised. For example, an outlet which is meeting a competitor's price cut but not exceeding it, may not bother to advertise the adjustment. Price cuts may be initiated without being advertised: the customer's attention may be attracted to them by window and store posters.

4. The meeting of competition by advertising retailers cannot be taken as representing the way in which price changes spread through the market area. Substantial differentials may be maintained for considerable periods: inertia of buyers and sellers and the difficulty of price comparisons even of popular items -- since there are hundreds of these-- tend to obstruct the swift spread of a price cut throughout a whole market area. An analysis of how price cutting affects the competition of different types of enterprise requires factual knowledge of the way in which a price change spreads. This type of knowledge can be gained only by very close cooperation of the outlets in demarcated trade areas or - much more hopefully -- by personal investigation in such areas selected as field bases.

5. Information on stocks carried, and on sales volume at various prices, is necessary to a full study of price competition in retail trade, from the standpoint of the operation, effects and social usefulness of alternative forms of price regulation.

ADVERTISED SALES PRICES OF THREE BRANDS OF ASPIRIN FOR THE SAME CHAIN IN TWO CITIES

1934-1935



SOURCE: ALL NEWSPAPER ADVERTISEMENTS BETWEEN JAN 1, 1934 AND OCT 15, 1935

NRA
DIVISION OF REVIEW
STATISTICS SECTION
NO 489

ANALYSIS OF MARGINS UNDER CONTRACTS ISSUED UNDER THE FAIR TRADE LAWS(*)

This analysis covers contracts issued in California by manufacturers and wholesalers to retailers. The material was obtained through correspondence. Letters were sent to all companies listed by Drug Trade News as operating under Fair Trade Laws; and to companies listed by Roy S. Warnack in "The California Fair Trade Act".

One hundred firms replied. Of the ninety replies from houses producing or distributing commodities within the jurisdiction of the former retail drug code, fifty-one contained price information. The other thirty-nine consisted of incomplete evidence, composed largely of contracts without prices, and comments on the worth of the law.

The other ten replies came from four whiskey distributors, two candy producers, one tobacco accessory manufacturer, and one photo finisher. The latter was using the law illegally, since he was fixing a price on a service, rather than a trade marked article.

All of the companies operating in more than one state depended upon the wholesalers for the major portion of their distribution. Repeatedly they stated that without a federal enabling act, none except the large producers could take advantage of the state laws without violating the Federal anti-trust laws.

Local manufacturers and distributers often could not or would not sue violators of their contract prices, because the expense was too great.

None of the respondents knew quantitatively, the effect of the Fair Trade Laws upon either their sales volume or the level of their prices. One manufacturer stated that he did not know the effect of the Fair Trade Law upon his business and gave his reason for issuing contracts, as follows:-

> "We conform to the practice simply because refusal might bring us an invidious distinction."

The entire industry is waiting for the California Supreme Court decision before it begins extensive operation under the law.

Several manufacturers, all with localized distribution, each characterizing himself as "small", complained that without retailer good-will, and manufacturer cooperation, the small manufacturer who entered into resale price maintenance contracts jeopardized his own business.

A manufacturer of a personal hygienic product wrote:-

> "Our experience in California has not been satisfactory--because none of our competitors signed.
>
> "The first store visited offered a competitive article,--

(*) Prepared by Anne Golden.

the owner stated he had signed a _____ contract but no longer kept them in stock because formerly he had sold them for 30¢ and upon trying to sell them at the increased price, namely 35¢ (the full retail price set in the contract) he experienced a decided customer reaction.

"Our drop in sales in California has to a large extent been recovered--by lowering the contract resale price."

Another manufacturer of a medicinal remedy wrote:-

"Due to the fact that we could not stop the price cutters from selling our items at these cut prices (57¢ for 85¢ item), the independent dealers who had signed contracts with us disregarded the cooperation which they were supposed to give--our business dropped from 20 to 25%."

The procedure in analyzing the prices, was to convert both the full retail price, and the contract price into indexes, with the manufacturer's wholesale dozen lot list price as the base. Thus a full retail index of 150 signifies a retailer's mark-up of 33 1/3%. It is necessary to use this base, rather than the conventional method of expressing mark-ups as a percentage of selling prices, in order to obtain a comparison of selling prices. Moreover, the margin can be converted into such a percentage by a simple device. If I is the index based on manufacturer's wholesale list price, then I-100 is the mark-up or margin based on retailer's selling price.

After conversion of prices into indexes, the subsequent procedure involved listing the full retail price indexes and contract price indexes in 17 categories, with one set of indexes per brand in each category. Thus a manufacturer making 5 sizes of face powder, priced at a full retail index of 150 and at a contract index of 112, occupied one entry under face powders. The purpose of the analysis was to compare the contract prices prevailing among manufacturers with their full retail prices.

An examination of Table I discloses an average difference of 17.7 between full retail price and contract price.

One wholesaler submitted a price list for his own private brands. The comparison of this with advertised brands is interesting. The average full retail price index on his goods, using his dozen lot price to retailers as the base, is 204.6 for 156 items as compared with 150.5 for advertised brands. The average index for the contract prices is 181.0 as compared with 132.8. The difference between the contract and the full recommended price is 23.6 index points.

The material is inadequate for a significant statement of manufacturers' margin policies. However, it is apparent, that on commodities previously cut in price the margins under contract were lower than on items not popularly cut.

TABLE I

MARGINS UNDER CONTRACT PRICES
OF 51 PRODUCERS

Type of Item	Contract Price No. of Items	Average	High-Low	Full Retail Price Average	High-Low	Difference between average for group
Antiseptics	16	126.6	133--111	154.3	192 -133	27.7
Asthma Rem.	1	150.0		150.0		0.0
Creams (face)	12	128.3	150 -117	147.8	155 -133	19.5
Dentifrices	18	122.6	144 - 99	150.6	194 -130	28.0
Digestive Aids	10	133.9	143 -121	156.2	175 -150	22.3
Foods	5	135.8	118 -143	150.0	150 -150	14.2
Hair Tonics	15	128.9	147 -112	147.4	181 -133	18.5
Headache Rem.	3	117.3	150 -114	150.0	150 -150	32.7
Inhalants	11	140.4	160 -126	153.5	160 -150	13.1
Laxatives	13	124.9	141 -114	144.9	150 -125	20.0
Ointments	18	140.5	188 -117	156.0	200 -133	15.5
Pills	1	150.0		150.0		0.0
Powders (face)	4	137.8	150 -122	148.3	150 -143	10.5
Powders (talc)	8	133.5	150 -126	155.2	167 -143	21.7
Remedies, misc.	35	132.4	156 -110	153.3	179 -141	20.9
Shaving Creams, soaps and remedies.	19	126.9	150 -117	142.2	160 -129	15.3
Toilet Articles misc.	45	127.3	166 -106	149.1	194 -124	21.8
Average		132.8		150.5		

Source: Prepared by Anne Golden.

One manufacturer of razor blades set a price on the blades, but refused to set one on the razors, stating in the body of the contract:-

> "Inasmuch as razors are sold primarily to stimulate blade business and obtain new users for (X) blades, a re-sale price will not be fixed on (X) razors, but it is agreed that the price at no time be less than cost."

Refusing to issue contracts caused organized retailer antagonism. In the Los Angeles area, the manufacturers did not want higher prices than had previously prevailed for fear they might lose their volume. In the San Francisco region they could not reduce the prices to the Los Angeles level, since the latter was lower than had prevailed in San Francisco before contracts were issued; and the retailers refused to sign such contracts.

There is no doubt that organized retailers are trying to influence the setting of the contract prices. In all states the state association, or a delegated committee passes on the contract forms. In passing on forms, they also pass on the margins. One of the replies received describes a situation that prevailed in one State as late as November 1, 1935. "A manufacturer wishing to come under the protection of the Act submits his price list, showing the wholesale prices to the retailer and the minimum resale price to the consumer, to this Committee for acceptance." (The Fair Trade Planning Committee). "After it has been accepted by them the manufacturer is satisfied to furnish a sufficient quantity of schedules to each jobber operating inside the limits of the State, to cover his retail drug accounts." - - - "by a vote of 13 to 6 the Fair Trade Planning Committee was instructed not to accept any manufacturer's line of merchandise which did not provide for at least a 33 1/3% gross profit on each and every undivided item in the line. This, in our opinion, will work to the detriment of the Fair Trade Act as practically all of the large manufacturers with National distribution have some items in their lines, which, due to competitive condition, could not be sold at a minimum that would provide a 50% mark-up over cost."

This condition does not obtain in the other states. While many retailers want this mark-up, the executives and active members of the organized groups are compromising on lower margins, with the expectation of increasing these later. Only two of the manufacturers replying had increased their prices; nine, however, had found it advisable to lower their prices to prevent or arrest a falling off of business.

In general, retailers are hoping for a contract index of 150, but are accepting lower ones. Manufacturers frequently are issuing contracts, not because they are convinced that such a procedure is economically desirable, but because it is expedient. The opinions concerning benefits accruing to the manufacturer from the use of contracts are conflicting. Some say that they are losing volume,

> ". . . the necessity of preventing our goods from being used as loss leaders reduces the amount of business we might have by at least 50%."

Others are of the opinion that business has improved. All complain that without retailer cooperation and this involves a delicate balancing of retailers' persistence for margins against manufacturer's loss of volume through increased prices the Fair Trade Acts will fail.

Undoubtedly a number of factors have slowed down the signing of contracts. Among them are: Uncertainty on the part of the manufacturers that operating under the Fair Trade Laws will, in the long run, prove most profitable; and the immediate threat of loss of volume through increased consumer prices, or loss of margin through increased retailer margins with fixed consumer prices.

DEPARTMENT OF COMMERCE
Office of
National Recovery Administration
Washington

November 20, 1935.

To the Manager of the Cosmetic, Toiletry and Drug Department:

Loss leader selling and retail price maintenance always have been problems of considerable importance to merchandisers of over-the-counter goods. Arguments at various times have been advanced on both sides of the issue, but there is still a real necessity for an impartial study of these problems.

Recognizing the need for factual information in this connection, the Loss Limitation Unit of the National Recovery Administration is conducting a study on cut-price selling and its general effects. The attached questionnaire is designed to yield information of particular importance in this study. We have endeavored to make this questionnaire as simple as possible and realize that it still is somewhat complicated, but so is the subject under study. If you are unable to answer all of the questions, please answer as many as possible and return the questionnaire.

Individual replies will be held strictly confidential and used only to prepare summaries of the data which may be prepared and will be grouped so that it will be impossible to segregate or identify your individual answers. It is not necessary to indicate the name of your store; the City and State in which the store is located is desired in order that comparisons may be made according to geographical areas.

Please return the questionnaires, filled out, by December 4, 1935, in the enclosed envelope, which requires no postage. The additional copy of the questionnaire is for your files.

Very truly yours,

L. C. Marshall, Director,
Division of Review,

DR-18

Confidential Government Report File No.....

Return to NATIONAL RECOVERY ADMINISTRATION
Division of Review,
Washington, D.C.
* * * * * * * *

QUESTIONNAIRE TO THE COSMETIC, TOILETRY AND DRUG DEPARTMENT
OF
DEPARTMENT STORES

The following questions are to be answered by the manager of the Cosmetic, Toiletry and Drug Department.

Address of your store _____
(City and State only)
* * * * * * * * * * *

1. Indicate by check ( ) the type of store:
__ Independent department store; __ Member of chain of department stores
* * * * * * * * * * *

2. Please estimate the per cent of the total cosmetics, toiletries and drugs purchased by YOUR DEPARTMENT from each of the following sources during 1934:

	1934
Direct from manufacturers.....	_____ %
Through group buying from manufacturers.....	_____
From wholesalers.....	_____
From all other sources.....	_____
(Specify most important other sources) _____	
Total cosmetics, toiletry and drugs purchased.	100 %

* * * * * * * * * * *

3. PRIOR TO OCTOBER 30, 1933 (effective date of Retail Trade Code), WHICH THREE TYPES OF RETAIL OUTLETS AFFORDED YOU THE MOST SEVERE COMPETITION in the sale of cosmetics, toiletries or drugs; and WHICH OF THEIR COMPETITIVE PRACTICES DID YOU FIND PARTICULARLY SEVERE? (Please use designations such as; chain drug store; chain cosmetic shop; independent drug store; independent cosmetic shop; independent cut-rate drug store; department stores, etc.)

	Type of Store	Competitive Practices
Most severe.....	_____	_____
2nd. most severe.....	_____	_____
3rd. most severe.....	_____	_____

* * * * * * * *

4. BETWEEN APRIL 8, 1934 and MAY 28, 1935 (while the loss limitation provision of the Retail Drug Code was in effect), no retailer could sell cosmetics, toiletries or drugs below the manufacturer's wholesale list price per dozen. DURING THIS PERIOD, WHICH THREE TYPES OF OUTLETS WERE YOUR MOST SEVERE COMPETITORS; and WHICH OF THEIR COMPETITIVE PRACTICES WERE PARTICULARLY SEVERE?

	Type of Store	Competitive Practices
Most severe.....		
2nd. most severe.....		
3rd. most severe.....		

5. AFTER MAY 28, 1935 (when all codes expired), WHICH THREE TYPES WERE YOUR MOST SEVERE COMPETITORS, and WHICH OF THEIR COMPETITIVE PRACTICES WERE PARTICULARLY SEVERE?

	Type of Store	Competitive Practices
Most severe.....		
2nd. most severe.....		
3rd. most severe.....		

6. IMMEDIATELY PRIOR TO OCTOBER 30, 1933 (effective date of Retail Trade Code), what were the POLICIES of the Cosmetic, Toiletry and Drug Department in the following matters:

A. POLICY ON P.M.'S (Immediately prior to October 30, 1933):

a. Did your clerks receive any P.M.'S on:
Nationally-known brands? ___ Yes ; ___ No.
Private brands? ___ Yes ; ___ No.

b. Indicate ( ) on which types of brands P.M.'S were more frequently given?
___ Nationally-known brands; ___ Private brands?

c. Did the manufacturer pay for the P.M.'S of the nationally-known brands?
___ Yes ; ___ No. If yes, in what manner?

d. Did the wholesaler pay for any P.M.'S on:
Manufacturer's brands? ___ Yes ; ___ No.
Wholesaler's brands? ___ Yes ; ___ No.
If yes, in what manner?

B. POLICY ON PRICES (Immediately prior to October 30, 1933):

a. Were your private brands generally priced HIGHER, LOWER or the SAME as comparable nationally-known brands?_____

C. POLICY ON ADVERTISING (Immediately prior to October 30, 1933):

a. What per cent of your department's advertising was usually devoted to private brands?_____

b. Was your private brand advertising usually INSTITUTIONAL in nature or did it stress PRICE APPEAL?_____

c. Was your advertising on nationally-known brands usually of the INSTITUTIONAL or the PRICE APPEAL type?_____

d. What per cent of your advertising on nationally-known brands was paid for by the manufacturer?_____

Remarks:

7. BETWEEN APRIL 8, 1934 and MAY 28, 1935 (while the loss limitation provision of the Retail Drug Code was in effect), what CHANGES did you make, if any, in the above mentioned policies? Please explain fully and give the reasons why these changes were made:

A. Changes in policies on P.M.'S? ___ Yes ; ___ No. Explain:

B. Changes in policies on PRICES? ___ Yes ; ___ No. Explain:

C. Changes in policies on ADVERTISING? ___ Yes ; ___ No. Explain:

8. AFTER MAY 28, 1935 (when all codes expired) what CHANGES did you make, if any in POLICIES as they existed during the period the loss limitation provision was in effect?
Please explain fully and give reasons.

A. Changes in policies on P.M.'S? ___ Yes ; ___ No. Explain:

B. Changes in policies on PRICES? ___ Yes ; ___ No. Explain:

C. Changes in policies on ADVERTISING? ___ Yes ; ___ No.
Explain:

9. State the number of DEMONSTRATORS and SELLING EMPLOYEES who worked in your department during a representative week of the following months:

	October, 1933	October, 1934	October, 1935
Number of demonstrators.....			
Number of other selling employees.....			

* * * * * * * *

10. Indicate who fixes the price on demonstrated merchandise at present:
___ Your store ___ Manufactures
Please give details.

* * * * * * * *

11. Have the manufacturers ever refused to sell you cosmetics, toiletry and drug merchandise because you refused to maintain their suggested minimum prices?
___ Yes ; ___ No.
If yes, please give details, including dates.

A. To what extent and in what way has this situation changed since the expiration of the code?

B. Do you at present respect manufacturers' suggested minimum prices as a general policy? ___ Yes ; ___ No. If yes, to what extent?

* * * * * * * *

12. Please list TEN of the cosmetic, toiletry or drug articles handled by you that were used as loss leaders in your community AT ANY TIME DURING OCTOBER, 1935 and give the following information:

Name, brand, and size of articles used as loss leaders using October, 1935	Do you ever use it as a loss leader yourself	Lowest loss leader price known to be used by your competitor Oct. 1935	Type of competitor using this loss leader price	Your price used to meet this loss leader price Oct. 1935
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				

13. Does your department use price appeal in order to attract customers into the store as a whole? ___ Yes ; ____ No. If yes, please state the amount credited to your department for attracting customers into the store, as a per cent of department's sales? 1933 _____%; 1934 _____%; 1935 _____% (estimate)

14. What changes, if any, were made in the sales and advertising policies of departments of the store other than the drug department, as a result of the Retail Drug Code loss limitation provision?_____

* * * * * * *

15. Please give your own definition of a "loss leader" as accurately as possible.

* * * * * * *

16. Indicate ( ) the dollar sales volume of your department (cosmetics, toiletries and drugs) for the calendar year 1934:

____Less than $10,000
____$10,000 to $20,000
____$20,000 to $40,000
____$40,000 to $80,000
____$80,000 to $160,000
____$160,000 to $320,000
____$320,000 to $640,000
____$640,000 and over.

FORM LETTER

Dear Sir:

Loss leader selling and resale price maintenance have long been important problems to retailers. From time to time, arguments have been advanced on both sides of the issues, but the need for an unbiased study of these problems still exists.

The Loss Limitation Unit of the National Recovery Administration needs factual information on cut price selling and its general effects. The attached questionnaire is designed to obtain this material. We have tried to make this questionnaire as simple and short as possible. We realize that it is still complicated. It contains no questions which it is impossible to answer; all that is needed is your patience and willingness to cooperate. This is an important subject to you. Please answer as many questions as possible.

Individual replies will be held in strictest confidence; summary data will be so grouped that it will be impossible to segregate or identify your individual answers.

Please return the filled in questionnaire by _____ in the enclosed envelope which requires no postage.

Yours very truly,

Confidential Government Report File No.

Return to NATIONAL RECOVERY ADMINISTRATION
Division of Review
Washington, D. C.
****

SURVEY OF RETAIL DRUG STORES

Address _____
(City) (State)

1. Name the trade associations of which you are a member.

2.(a) Indicate by check (✓) the TYPE Of store:
☐ Independent; ☐ Chain; If a Chain, ☐ Local; ☐ National or Sectional.

If a chain store, list the total number of stores in the entire system_____
(Note: Classify as chain store only those establishments belonging to a system of more than 3 stores; all others are independent.)

(b) Indicate by check (✓) the LOCATION of the store:
☐ Rural Area
☐ Principal shopping center of city
☐ Local shopping center
☐ Neighborhood store

(Note: Classify as rural any store located in an unincorporated community, or in a town of less than 2,500 persons)

(c) Indicate by (✓) the KIND of store:
☐ Full-line drugs, cosmetics and prescription service
☐ Full-line drugs, and cosmetics, NO prescription service
☐ Fast selling drugs and/or cosmetics only
☐ Section of Department store
☐ Other (specify)_____

(d) Do you have a soda fountain? ☐ Yes; ☐ No.

3.(a) Indicate by (✓) your competitive policy, with respect to drugs, cosmetics, and toiletry products during EACH of the two following periods:

	During life of loss limitation Provision of Retail Drug Code (April 9, 1934 to May 27, 1935)	At Present
COMPETITIVE POLICY:		
Initiate price cuts		
Meet price cuts		
Ignore price cuts		

(b) Do you meet competitor's price cuts on drug, cosmetic, and toilet products, even though the lower price may be below your net invoice cost? ☐ Yes; ☐ No.

If yes, do you meet such price cuts for:
☐ All your competitors
☐ Certain competitors (specify which competitors and under what conditions

_____
_____

(c) Do you continue to sell these drug, cosmetic, and toiletry products at reduced prices after your competitor has raised his prices? ☐ Yes; ☐ No. If yes, for how long? _____ hours or _____ days.

4. List, for each of the types specified below, the NUMBER of YOUR SEVERE COMPETITORS in the retailing of drug, cosmetic, and toiletry products in your community during each of the following periods:

	Pre-code (January to October, 1933)	Code (April 9, 1934 to May 27, 1935)	Post-code (June, 1935 to date)
Neighborhood Independent Druggist			
Cut-rate independent druggist			
Chain store			
5¢, 10¢ to $1.00 store			
Cosmetic Section, Department Store			
Other Type (Specify)			

5.(a) Which three of the above types of stores, others, are now your MOST SEVERE COMPETITORS in retailing drug, cosmetic, and toiletry products; and which of their COMPETITIVE PRACTICES ARE PARTICULARLY SEVERE. (Cutting below your net cost, penny sales, coupons, etc.)

Type of Store: _____ _____ _____

Competitive Practice: _____ _____ _____

(b) BETWEEN APRIL 8, 1934 and MAY 27, 1935 (while the loss limitation provision of the Retail Drug Code was in effect) no retailer could sell drug, cosmetic, and toiletry products below manufacturer's wholesale list price per dozen. DURING THIS PERIOD, which three types were your MOST SEVERE COMPETITORS; and which of their COMPETITIVE PRACTICES WERE PARTICULARLY SEVERE.

Type of store: _____ _____ _____

Competitive Practice: _____ _____ _____

(c) BETWEEN JANUARY, 1933 and SEPTEMBER, 1933 (prior to the effective date of the Retail Trade Code), which three types were your most SEVERE COMPETITORS; and which of their COMPETITIVE PRACTICES WERE PARTICULARLY SEVERE.

Type of Store: _____ _____ _____

Competitive Practice: _____ _____ _____

6. Please list any TEN of the drug, cosmetic, or toiletry articles handled by you that were used as loss leaders in your community AT ANY TIME DURING JANUARY, 1935, and give the following information:

Name, brand, and size of articles commonly used as loss leaders in your community during Jan. 1936	Do you ever use it as a loss leader yourself	Lowest loss leader price known to be used by your competitor January, 1936	Type of competition using this loss leader price	Your price used to meet this loss leader price Jan. 1936	Your net invoice cost Jan. 1936
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					

In answering the following questions, consider an "item" a product of a given brand and size; for example, 6 dozen tubes of "Munzodent" toothpaste, 50¢ size, and 6 tubes of "Munzodent" toothpaste, 25¢ size, are to be counted as 2 "items".

7. How many drug, cosmetic and toiletry items do you carry in this store?_____

8.(a) The Loss Limitation Provision of the retail drug code, prohibiting sales of drugs, cosmetics, and toiletries below the manufacturer's list price per dozen, was in effect from April 9, 1934 to May 27, 1935. When the code went into effect, on how many such items Number of items

(1) Did you RAISE your selling price?_____

(2) Did you LOWER your selling price?_____

(3) Did you set the CODE MINIMUM (that is, at 1/12 of manufacturer's list price per dozen) as your selling price?_____

(b) In making the above price INCREASES, if any, how many items did you raise TO CODE MINIMUM?_____

Please comment:_____

_____

(c) In making the above price DECREASES, if any, how many items did you reduce to CODE MINIMUM?_____

Please comment:_____

_____

9.(a) Since the codes expired (May 27, 1935) on how many drug, cosmetic, and toiletr items: Number of items

(1) Did you RAISE your selling price .....

(2) Did you LOWER your selling price .....

(3) Has your net invoice cost increased .....

(4) Has your net invoice cost decreased .....

(b) If you have indicated above that the net invoice cost of certain items has increased, please give your opinion of the reason for this increase.

(c) If you have indicated above that the net invoice cost of certain items has increased, please give your opinion as to the reason for this decrease in cost.

10.(a) How many items under Fair Trade Contracts did you carry prior to May 27, 1935?
_____

(b) How many items that you carry have been put under Fair Trade contracts since May 27, 1935?_____ Number of items

(c) On how many items under Fair Trade Contracts
(1) Is the selling price higher than the code minimum in effect at the expiration of the code? _____
(2) Is the selling price lower than the code minimum in effect at the expiration of the code? _____
(3) Is the net invoice cost higher than at the expiration of the code? _____
(4) Is the net invoice cost lower than at the expiration of the code? _____

(d) If you have indicated above that the net invoice cost of certain items is now higher than at the expiration of the code, please give your explanation of the increase in cost:_____

(e) If you have indicated above that the net invoice cost of certain items is now lower than at the expiration of the code, please give your explanation of the decrease in cost:_____

(f) How many items now under Fair Trade Contracts were formerly loss leaders?____

11. IMMEDIATELY PRIOR TO OCTOBER 30, 1933 (effective date of Retail Trade Code), what were the POLICIES of your store with respect to drug, cosmetic and toiletry products?:

A. POLICY ON P.M'S (Immediately prior to October 30, 1933):
a. Did your clerks receive any P.M'S on:
Nationally-known brands? ☐ Yes; ☐ No.
Private brands? ☐ Yes; ☐ No.
b. Indicate by a (✓) on which types of brands P.M's were more frequently given:
☐ Nationally-known brands? ☐ Private brands
c. Did the manufacturer pay for the P.M's of the nationally-known brand
☐ Yes: ☐ No; If yes, in what manner?_____
d. Did the wholesaler pay for any P.M's on:
Manufacturer's brands? ☐ Yes; ☐ No.
Wholesaler's brands? ☐ Yes; ☐ No.

B. POLICY ON PRICES (Immediately prior to October, 30, 1933):
a. Were your private brands generally priced HIGHER, LOWER or the SAME as comparable nationally-known brands?_____

C. POLICY ON ADVERTISING (Immediately prior to October 30, 1933):
a. What percent of your printed and radio advertising was usually devoted to private brands?_____%
b. What percent of your window and counter display was actually devoted to private brands?_____%
c. Did your private brand advertising usually stress:
☐ PRICE APPEAL; ☐ USE OF COMMODITY; ☐ OTHER ADVERTISING;
Specify:_____

d. Did your advertising on nationally-known brands usually stress:
☐ PRICE APPEAL; ☐ USE OF COMMODITY.

e. What percent of your advertising on nationally-known brands was paid for by the manufacturer?_____%

12. BETWEEN APRIL 9, 1934 and May 27, 1935 (while the loss limitation provision of the Retail Drug Code was in effect), what CHANGES did you make, if any, in the above mentioned policies? Please explain fully and give the reasons why these changes were made:

A. Changes in policies on P.M's_____
B. Changes in policies on PRICES_____
C. Changes in policies on ADVERTISING_____

13. Since the expiration of the code, May 27, 1935, what changes have you made, if any, in the above mentioned policies? Please explain fully and give the reasons for these changes.

A. Changes in policies on P.M's_____
B. Changes in policies on Prices_____
C. Changes in policies on advertising_____

14.(a) What changes have you made, if any, in your price policies on nationally-advertised brands, on which there are no fair trade contracts, since the expiration of the code? Please comment:_____

(b) What changes have you made, if any, in your price policies on Private Brands on which there are no fair trade contracts, since the expiration of the code? please comment._____

B.(a) What changes have you made, if any, in your Advertising Policies on nationally-known brands, in which there are no fair trade contracts, since the expiration of the code? Please comment:

(b) What changes have you made, if any, in your dvertising Policies on Private Brands on which there are no fair-trade contracts, since the expiration of the code? Please comment._____

15. Please estimate what percentage of your total drug, cosmetic, and toiletry sales has been in private brand merchandise during each of the following periods:

a. Before Retail Drug Code (1st 6 months, 1933).....____%
b. During Retail Drug Code (1st 6 months, 1934).....____%
c. Last six months of 1935 .....____%

16. Indicate by a (✓) which of the following plans you PREFER for selling drug, cosmetic, and toiletry products.

☐ No control plan
☐ Loss Limitation provision of Retail Drug Code
☐ Prohibition of sale below actual cost
☐ Fair Trade Act
☐ Other plan. Please explain:

17. Give the following data for your store for each of the years specified below ending December 31 (or the close of your fiscal year nearest that date - specify date_____). Reference to your income tax returns will be helpful in supplying the information requested below. Report for the entire store.

	1929	1931	1933	1934	1935 Estimate
Net Sales (in dollars).....					
Average inventory carried ...					
Total cost of merchandise ...					
Net operating profit or loss. (put ring around loss)					

Indicate by a (✓) which of the following methods was used in computing inventory

☐ Selling price ☐ Purchasing price

18. Define "Loss Leader" in your own terms:_____

CITIES FOR THE RETAIL DRUG QUESTIONNAIRE
NUMBERS BASED ON THE 1933 CENSUS
OF AMERICAN BUSINESS

(Note (*) - Indicates States with Fair Trade Laws)

	CITY AND STATE	NUMBER OF DRUG STORES
	ALABAMA	
	Birmingham, Jefferson County	156
	Mobile, Mobile County	40
	Montgomery, Montgomery County	36
	ARKANSAS	
	Little Rock, Pulaski County	56
	ARIZONA	
	Phoenix, Maricopa County	44
*	CALIFORNIA	
	Fresno, Fresno County	42
	Los Angeles, Los Angeles County	949
	San Francisco, Coex	436
	San Jose, Santa Clara County	34
	COLORADO	
	Denver, Denver County	247
*	Pueblo, Pueblo County	25
	CONNECTICUT	
	Bridgeport, Fairfield County	101
	New Britain, Hartford County	27
	New Haven, New Haven County	113
	DELAWARE	
	Wilmington, Newcastle County	65
	FLORIDA	
	Miami, Dade County	133
	Jacksonville, Duval County	116
	GEORGIA	
	Macon, Bibb County	34
	Savannah, Chatham County	60
	Atlanta, Fulton and DeKalb Counties	190
	IDAHO	
	Boise, Ada County	7
*	ILLINOIS	
	Chicago, Cook County	1,500 (out of total of 1946)
	Peoria, Peoria County	54
	Springfield, Sangamon County	40

INDIANA	
Evansville, Vanderburg County	60
Ft. Wayne, Allen County	86
Indianapolis, Marion County	293
Terre Haute, Vigo County	54
* IOWA	
Cedar Rapids, Linn County	49
Des Moines, Polk County	116
KANSAS	
Topeka, Shawnee County	48
Wichita, Sedgwick County	96
KENTUCKY	
Louisville, Jefferson County	219
Covington, Kenton County	45
LOUISIANA	
New Orleans, Orleans Parish	325
Shreveport, Cede Parish	49
MAINE	
Portland, Cumberland County	46
* MARYLAND	
Baltimore	485
MASSACHUSETTS	
New Bedford, Bristol County	89
Lynn, Essex County	47
Springfield, Hampdon County	79
Somerville, Middlesex County	42
Lowell, Middlesex County	52
Malden, Middlesex County	34
Quincy, Norfolk County	38
Brocton, Plymouth County	30
Boston, Suffolk County	484
MICHIGAN	
Lansing, Ingram County	55
Kalamazoo, Kalamazoo County	38
Grand Rapids, Kent County	106
Pontiac, Oakland County	36
Detroit, Wayne County	904
MINNESOTA	
Minneapolis, Hennepin County	268
St. Paul, Ramsey County	168
Duluth, St. Louis County	57
MISSISSIPPI	
Jackson, Hindz County	35

MISSOURI	
St. Joseph, Buchanan County	75
Kansas City, Jackson County	412
St. Louis, St. Louis County	615
MONTANA	
Great Falls, Cascade County	12
NEBRASKA	
Omaha, Douglas County	149
Lincoln, Lancaster County	56
NEW HAMPSHIRE	
Manchester, Hillsborough County	42
* NEW JERSEY	
Camden, Camden County	84
Newark, Essex County	250
Jersey City, Hudson County	132
Trenton, Mercer County	56
Patterson, Passaic County	72
Elizabeth, Union County	57
* NEW YORK	
Albany, Albany County	82
Binghampton, Broone County	23
New York City (Manhattan and Bronx)	1800
Buffalo, Erie County	284
Rochester, Monroe County	148
Syracuse, Onendaga County	86
Schenectady, Schenectady County	43
NORTH CAROLINA	
Asheville, Buncombe County	34
Durham, Durham County	28
Winston-Salem, Forsyth County	30
Greensboro, Gilford County	32
Charlotte, Middlesex County	43
NORTH DAKOTA	
Fargo, Cass County	15
OHIO	
Hamilton, Butte County	27
Springfield, Clark County	35
Cleveland, Cuyahoga County	510
Columbus, Franklin County	214
Cincinnati, Hamilton County	311
Youngstown, Mahoning County	80
Canton, Starke County	63
Akron, Summit County	126
OKLAHOMA	
Oklahoma City, Oklahoma County	128
Tulsa, Tulsa County	100

9726

*	OREGON	
	Portland, Multnomah County	245
*	PENNSYLVANIA	
	Pittsburgh, Allegheny County	329
	Reading, Berks County	48
	Johnstown, Cambria County	37
	Erie, Erie County	32
	Scranton, Lackawanna County	63
	Allentown, Lehigh County	36
	Wilkes-Barre, Luzerne County	47
	Philadelphia, Coex County	1,302
	RHODE ISLAND	
	Providence, Providence County	167
	Pawtucket, Providence County	47
	SOUTH CAROLINA	
	Charleston, Charleston County	44
	Columbia, Richland County	43
	TENNESSEE	
	Nashville, Davidson County	128
	Chattanooga, Hamilton County	73
	Memphis, Shelby County	161
	TEXAS	
	San Antonio, Bexar County	172
	Dallas, Dallas County	197
	El Paso, El Paso County	52
	Houston, Harris County	206
	Waco, McLennan County	35
	UTAH	
	Salt Lake City, Salt Lake County	54
	VIRGINIA	
	Richmond	111
	Roanoke	43
*	WASHINGTON	
	Seattle, King County	306
	Spokane, Spokane County	63
	WEST VIRGINIA	
	Huntington, Cabell County	50
	Charleston, Kanawha County	47
	Wheeling, Ohio County	32
*	WISCONSIN	
	Madison, Dane County	57
	Milwaukee, Milwaukee County	420
	Racine, Racine County	37

WYOMING		
Cheyenne, Laramie County	11	
TOTAL.....	19,987	drug stores as of 1933
Thirty-seven cities, Fair Trade Laws	9,844	
Eighty-eight other States	10,143	

DRUG WHOLESALERS

Name of Establishment_____Address_____

Of what Trade Association are you a member?_____

1. Check one in each subgroup of the following questions:

a. Are you an independent? Yes_____ No_____
b. Are you a chain? Yes_____ No_____
(If a chain, give total establishments in system_____
c. Do you travel salesmen? Yes_____ No_____
d. Do you deliver? Yes_____ No_____
e. Which one of the following types of establishment is this?
Service_____: Mutual_____: Cooperative:_____
Short line_____: If other, please specify_____
f. What is your credit policy?
Cash and carry? Yes_____: No_____: C.O.D.? Yes_____No_____
Terms? Yes_____No_____: Please specify_____
g. Which one of the following is your present price policy?
Cut-rate?_____: Non-cut-rate?_____:
(1) How, if at all, did this differ from your policy while the retail drug code was in effect?_____

_____

h. Which one of the following is your present competitive policy?
Initiate price cuts?_____: Meet price cuts?_____Ignore price cuts___
Remarks_____
(1) How, if at all, did this differ from your policy while the retail drug code was in effect?_____

_____

2. a. Between April 8, 1934 and May 27, 1935 (when Retail Drug Code was in effect) what changes, if any, did wholesalers in your territory make on discounts given on advertised products?

_____

Kind of wholesaler	DISCOUNTS Increased	Decreased	Remained Unchanged
Service			
Short-line			
Mutual			
Please list others of importance			

Remarks:_____

b. After May 27, 1935 (when all codes expired) what changes, if any, did wholesalers in your territory make on discounts given on advertised products?

Kind of wholesaler	DISCOUNTS Increased	Decreased	Remain Unchanged
Service			
Short-line			
Mutual			
Please list others of importance			

Remarks:

c. Specify which of these actions you attribute to the Fair Trade Rules drawn up by the Federal Trade Commission:

3. a. Between April 8, 1934 and May 27, 1935 (when the Retail Drug Code was in effect) what competitive measures, if any, were adopted by wholesalers, (Such as cut-price on private brands).

Kind of Wholesaler	Newly Adopted Competitive Measures
You	
Service	
Short-line	
Mutual	
Please list others of importance	

b. Which competitive measures, if any, adopted by wholesalers in your territory, are, in your opinion, the result of the Federal Trade Commission Rules of Fair Practices?

By Whom Used?	Practices

Remarks

c. Which competitive measures, if any, that have been adopted by wholesalers in your territory, are the result of Fair Trade Laws?

By Whom Adopted?	Practices

Remarks

4. Do you think that the loss limitation provision was a factor in improving the credit position of your customers?_____
Explain the effects on the amount of C.O.D. selling; the repayment of accounts outstanding, and the securing of more prompt payments, etc.

5. a. Were any new retailer buying groups organized in your territory during the period that the loss limitation provision was in effect?_____
If so, please specify by type and how many:_____

b. Since the Codes expired have any new retailer buying groups been organized in your territory?_____ If so, please specify by type and how many_____

6. a. In your opinion which stabilization plan, if any, is the most satisfactory from the manufacturer's viewpoint?_____
Explain:_____

b. From the wholesaler's viewpoint?_____
Explain:_____

c. From the retailer's viewpoint?_____
Explain:_____

d. From the consumer's viewpoint?_____
Explain:_____

7. How did the enactment and operation of the retail drug trade code affect the position of the wholesalers in your territory? Explain:

8. How did the Fair Trade Rules for Wholesalers, promulgated by the Federal Trade Commission, affect the position of the wholesalers in your community?_____
Explain:_____

9. In your opinion, how useful is, and what are the shortcomings of loss leader selling as a retail marketing device?_____

SUMMARY TABLE NO. I

Price Study of 12 Leading Drug Items in 108 Manhattan Drug Stores

Aggregate Pre-Code and During Code Prices in Each Store

(Arranged in Order of Ascending Pre-code Prices)

No.*	Pre-Code Price (Dollars)	During Code-Price (Dollars)	No.*	Pre-Code Price (Dollars)	During Code-Price (Dollars)	No.*	Pre-Code Price (Dollars)	During Code-Price (Dollars)
1	3.64	3.81	43	4.32	4.21	85	4.63	4.46
2	3.70	3.75	44	4.33	4.38	86	4.64	4.10
3	3.74	3.98	45	4.34	3.81	87	4.65	4.48
4	3.78	3.75	46	4.34	3.95	88	4.66	4.37
5	3.82	3.75	47	4.34	4.42	89	4.66	4.58
6	3.82	4.23	48	4.35	4.19	90	4.67	4.56
7	3.87	3.98	49	4.36	3.77	91	4.67	4.76
8	3.89	3.75	50	4.36	4.23	92	4.70	4.54
9	3.93	3.79	51	4.36	4.23	93	4.72	4.38
10	3.94	3.87	52	4.36	4.56	94	4.76	4.41
11	3.98	3.90	53	4.37	4.32	95	4.79	4.70
12	4.04	3.59	54	4.39	4.26	96	4.83	4.80
13	4.06	4.05	55	4.39	4.42	97	4.84	3.83
14	4.08	3.80	56	4.40	4.34	98	4.84	4.17
15	4.08	4.03	57	4.41	4.60	99	4.84	4.38
16	4.09	3.88	58	4.42	3.97	100	4.85	4.15
17	4.09	3.89	59	4.42	4.20	101	4.86	4.52
18	4.10	3.97	60	4.43	3.73	102	4.87	4.14
19	4.10	4.00	61	4.43	3.90	103	4.88	3.88
20	4.11	3.72	62	4.44	4.07	104	4.88	3.93
21	4.11	3.91	63	4.46	4.20	105	4.88	3.99
22	4.17	4.21	64	4.46	4.26	106	5.16	4.75
23	4.18	4.00	65	4.48	4.34	107	5.28	4.76
24	4.20	4.52	66	4.50	4.02	108	5.34	5.08
25	4.21	3.80	67	4.50	4.31			
26	4.22	3.94	68	4.51	3.87			
27	4.22	3.96	69	4.51	4.40			
28	4.23	3.93	70	4.52	4.10			
29	4.25	4.06	71	4.53	4.26			
30	4.25	4.44	72	4.54	4.42			
31	4.25	4.52	73	4.56	4.32			
32	4.26	4.02	74	4.56	4.38			
33	4.26	4.20	75	4.57	3.73			
34	4.26	4.30	76	4.58	3.86			
35	4.26	4.47	77	4.58	3.94			
36	4.26	4.76	78	4.58	4.30			
37	4.27	3.81	79	4.58	4.30			
38	4.27	4.48	80	4.58	4.48			
39	4.29	4.13	81	4.60	4.49			
40	4.29	4.29	82	4.61	4.19			
41	4.30	3.94	83	4.63	4.29			
42	4.30	4.38	84	4.63	4.30			

* These numbers identify the stores throughout this Table and Summary Table II.

SUMMARY TABLE NO. II

Price Study of 12 Leading Drug Items in 108 Manhattan Drug Stores

Aggregate Pre-Code and During Code Prices in Each Store
(Arranged in Order of Ascending During Code Prices)

No.*	During Code Price (Dollars)	Pre-Code Price (Dollars)	No.*	During Code Price (Dollars)	Pre-Code Price (Dollars)	No.*	During Code Price (Dollars)	Pre-Code Price (Dollars)
12	3.59	4.04	29	4.06	4.25	85	4.46	4.63
20	3.72	4.11	62	4.07	4.44	35	4.47	4.26
2	3.75	3.70	70	4.10	4.52	38	4.48	4.27
4	3.75	3.78	86	4.10	4.64	80	4.48	4.58
5	3.75	3.82	39	4.13	4.29	87	4.48	4.65
8	3.75	3.89	102	4.14	4.87	81	4.49	4.60
49	3.77	4.36	100	4.15	4.85	24	4.52	4.20
60	3.78	4.43	98	4.17	4.84	31	4.52	4.25
75	3.78	4.57	48	4.19	4.35	101	4.52	4.86
9	3.79	3.93	82	4.19	4.61	92	4.54	4.70
14	3.80	4.08	33	4.20	4.26	52	4.56	4.36
25	3.80	4.21	59	4.20	4.42	90	4.56	4.67
1	3.81	3.64	63	4.20	4.46	89	4.58	4.66
37	3.81	4.27	22	4.21	4.17	57	4.60	4.41
45	3.81	4.34	43	4.21	4.32	95	4.70	4.79
97	3.83	4.84	53	4.22	4.37	106	4.75	5.16
76	3.86	4.58	6	4.23	3.82	36	4.76	4.26
10	3.87	3.94	50	4.23	4.36	91	4.76	4.67
68	3.87	4.51	51	4.23	4.36	107	4.76	5.28
16	3.88	4.09	54	4.26	4.39	96	4.80	4.83
103	3.88	4.88	64	4.26	4.46	99	4.80	4.84
17	3.89	4.09	71	4.26	4.53	108	5.03	5.34
11	3.90	3.98	40	4.29	4.29			
61	3.90	4.44	83	4.29	4.63			
21	3.91	4.11	34	4.30	4.26			
28	3.93	4.23	78	4.30	4.58			
104	3.93	4.88	79	4.30	4.58			
26	3.94	4.22	84	4.30	4.63			
41	3.94	4.30	61	4.31	4.50			
77	3.94	4.58	73	4.33	4.56			
46	3.95	4.34	56	4.34	4.40			
27	3.96	4.22	65	4.34	4.46			
18	3.97	4.10	88	4.37	4.66			
58	3.97	4.42	42	4.38	4.30			
3	3.98	3.74	44	4.38	4.33			
7	3.98	3.87	74	4.38	4.56			
105	3.99	4.88	93	4.38	4.72			
19	4.00	4.10	69	4.40	4.51			
23	4.00	4.18	94	4.41	4.76			
32	4.02	4.26	47	4.42	4.34			
66	4.02	4.50	55	4.42	4.59			
15	4.03	4.08	72	4.43	4.54			
13	4.05	4.06	30	4.44	4.25			

* These numbers identify the stores throughout this Table and Summary Table No. I

SUMMARY TABLE NO. III

Price Study of 12 Leading Drug Items in 108 Manhattan Drug Stores

LIQUID ORAL ANTISEPTIC NO. 1

Number of Stores Selling at Each Price, Pre-Code and During Code

Price	Number of Stores	
	Pre-Code	During Code
$ .50	1	38
.51	0	11
.53	0	3
.54	1	2
.55	1	3
.56	1	0
.57	2	0
.59	77	42
.60	0	1
.62	1	0
.63	0	1
.65	1	3
.69	14	4
.75	1	0
.89	6	0
.95	1	0
1.00	1	0
	108	108

SUMMARY TABLE NO. IV

Price Study of 12 Leading Drug Items in 108 Manhattan Drug Stores

LIQUID ORAL ANTISEPTIC NO. 2

Number of Stores Selling at Each Price. Pre-Code and During Code

Price	Number of Stores	
	Pre-Code	During Code
$ .45	1	0
.50	1	0
.59	1	0
.63	1	0
.64	2	0
.65	1	0
.67	2	6
.69	22	15
.70	0	8
.71	0	1
.73	2	1
.74	1	0
.75	3	4
.79	37	41
.85	2	2
.89	28	18
.90	3	9
.95	1	2
	108	108

SUMMARY TABLE NO. V

Price Study of 12 Leading Drug Items in 108 Manhattan Drug Stores

RAZOR BLADES NO. 2

Number of Stores Selling at Each Price, Pre-Code and During Code

Price	Number of Stores	
	Pre-Code	During Code
$ .21	5	1
.23	5	1
.24	3	28
.25	24	28
.27	8	9
.28	1	5
.29	42	23
.30	10	6
.31	0	1
.32	2	3
.33	0	1
.35	6	2
.39	1	0
.40	1	0

OFFICE OF THE NATIONAL RECOVERY ADMINISTRATION
THE DIVISION OF REVIEW

THE WORK OF THE DIVISION OF REVIEW

Executive Order No. 7075, dated June 15, 1935, established the Division of Review of the National Recovery Administration. The pertinent part of the Executive Order reads thus:

> The Division of Review shall assemble, analyze, and report upon the statistical information and records of experience of the operations of the various trades and industries heretofore subject to codes of fair competition, shall study the effects of such codes upon trade, industrial and labor conditions in general, and other related matters, shall make available for the protection and promotion of the public interest an adequate review of the effects of the Administration of Title I of the National Industrial Recovery Act, and the principles and policies put into effect thereunder, and shall otherwise aid the President in carrying out his functions under the said Title. I hereby appoint Leon C. Marshall, Director of the Division of Review.

The study sections set up in the Division of Review covered these areas: industry studies, foreign trade studies, labor studies, trade practice studies, statistical studies, legal studies, administration studies, miscellaneous studies, and the writing of code histories. The materials which were produced by these sections are indicated below.

Except for the Code Histories, all items mentioned below are scheduled to be in mimeographed form by April 1, 1936.

THE CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operation of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The Code Histories, (including histories of certain NRA units or agencies) are not mimeographed. They are to be turned over to the Department of Commerce in typewritten form. All told, approximately eight hundred and fifty (850) histories will be completed. This number includes all of the approved codes and some of the unapproved codes. (In Work Materials No. 18, Contents of Code Histories, will be found the outline which governed the preparation of Code Histories.)

(In the case of all approved codes and also in the case of some codes not carried to final approval, there are in NRA files further materials on industries. Particularly worthy of mention are the Volumes I, II and III which constitute the material officially submitted to the President in support of the recommendation for approval of each code. These volumes

set forth the origination of the code, the sponsoring group, the evidence advanced to support the proposal, the report of the Division of Research and Planning on the industry, the recommendations of the various Advisory Boards, certain types of official correspondence, the transcript of the formal hearing, and other pertinent matter. There is also much official information relating to amendments, interpretations, exemptions, and other rulings. The materials mentioned in this paragraph were of course not a part of the work of the Division of Review.)

THE WORK MATERIALS SERIES

In the work of the Division of Review a considerable number of studies and compilations of data (other than those noted below in the Evidence Studies Series and the Statistical Material Series) have been made. These are listed below, grouped according to the character of the material. (In Work Materials No. 17, Tentative Outlines and Summaries of Studies in Process, these materials are fully described).

Industry Studies

Automobile Industry, An Economic Survey of
Bituminous Coal Industry under Free Competition and Code Regulation, Economic Survey of
Electrical Manufacturing Industry, The
Fertilizer Industry, The
Fishery Industry and the Fishery Codes
Fishermen and Fishing Craft, Earnings of
Foreign Trade under the National Industrial Recovery Act
  Part A - Competitive Position of the United States in International Trade 1927-29 through 1934.
  Part B - Section 3 (e) of NIRA and its administration.
  Part C - Imports and Importing under NRA Codes.
  Part D - Exports and Exporting under NRA Codes.
Forest Products Industries, Foreign Trade Study of the
Iron and Steel Industry, The
Knitting Industries, The
Leather and Shoe Industries, The
Lumber and Timber Products Industry, Economic Problems of the
Men's Clothing Industry, The
Millinery Industry, The
Motion Picture Industry, The
Migration of Industry, The: The Shift of Twenty-Five Needle Trades From New York State, 1926 to 1934
National Labor Income by Months, 1929-35
Paper Industry, The
Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January 1923, to date
Retail Trades Study, The
Rubber Industry Study, The
Textile Industry in the United Kingdom, France, Germany, Italy, and Japan
Textile Yarns and Fabrics
Tobacco Industry, The
Wholesale Trades Study, The
Women's Neckwear and Scarf Industry, Financial and Labor Data on

Trade Practice Studies

Labor Studies

Administrative Studies

Legal Studies

THE EVIDENCE STUDIES SERIES

The Evidence Studies were originally undertaken to gather material for pending court cases. After the Schechter decision the project was continued in order to assemble data for use in connection with the studies of the Division of Review. The data are particularly concerned with the nature, size and operations of the industry; and with the relation of the industry to interstate commerce. The industries covered by the Evidence Studies account for more than one-half of the total number of workers under codes. The list of these studies follows:

Automobile Manufacturing Industry
Automotive Parts and Equipment Industry
Baking Industry
Boot and Shoe Manufacturing Industry
Bottled Soft Drink Industry
Builders' Supplies Industry
Canning Industry
Chemical Manufacturing Industry
Cigar Manufacturing Industry
Coat and Suit Industry
Construction Industry
Cotton Garment Industry
Dress Manufacturing Industry
Electrical Contracting Industry
Electrical Manufacturing Industry
Fabricated Metal Products Mfg. and Metal Finishing and Metal Coating Industry
Fishery Industry
Furniture Manufacturing Industry
General Contractors Industry
Graphic Arts Industry
Gray Iron Foundry Industry
Hosiery Industry
Infant's and Children's Wear Industry
Iron and Steel Industry
Leather Industry
Lumber and Timber Products Industry
Mason Contractors Industry
Men's Clothing Industry
Motion Picture Industry
Motor Vehicle Retailing Trade
Needlework Industry of Puerto Rico
Painting and Paperhanging Industry
Photo Engraving Industry
Plumbing Contracting Industry
Retail Lumber Industry
Retail Trade Industry
Retail Tire and Battery Trade Industry
Rubber Manufacturing Industry
Rubber Tire Manufacturing Industry
Shipbuilding Industry
Silk Textile Industry
Structural Clay Products Industry
Throwing Industry
Trucking Industry
Waste Materials Industry
Wholesale and Retail Food Industry
Wholesale Fresh Fruit and Vegetable Industry
Wool Textile Industry

THE STATISTICAL MATERIALS SERIES

This series is supplementary to the Evidence Studies Series. The reports include data on establishments, firms, employment, payrolls, wages, hours, production capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned. The following numbers appear in the series:
9768—5.

Asphalt Shingle and Roofing Industry
Business Furniture
Candy Manufacturing Industry
Carpet and Rug Industry
Cement Industry
Cleaning and Dyeing Trade
Coffee Industry
Copper and Brass Mill Products Industry
Cotton Textile Industry
Electrical Manufacturing Industry
Fertilizer Industry
Funeral Supply Industry
Glass Container Industry
Ice Manufacturing Industry
Knitted Outerwear Industry
Paint, Varnish, and Lacquer, Mfg. Industry
Plumbing Fixtures Industry
Rayon and Synthetic Yarn Producing Industry
Salt Producing Industry

THE COVERAGE

The original, and approved, plan of the Division of Review contemplated resources sufficient (a) to prepare some 1200 histories of codes and NRA units or agencies, (b) to consolidate and index the NRA files containing some 40,000,000 pieces, (c) to engage in extensive field work, (d) to secure much aid from established statistical agencies of government, (e) to assemble a considerable number of experts in various fields, (f) to conduct approximately 25% more studies than are listed above, and (g) to prepare a comprehensive summary report.

Because of reductions made in personnel and in use of outside experts, limitation of access to field work and research agencies, and lack of jurisdiction over files, the projected plan was necessarily curtailed. The most serious curtailments were the omission of the comprehensive summary report; the dropping of certain studies and the reduction in the coverage of other studies; and the abandonment of the consolidation and indexing of the files. Fortunately, there is reason to hope that the files may yet be cared for under other auspices.

Notwithstanding these limitations, if the files are ultimately consolidated and indexed the exploration of the NRA materials will have been sufficient to make them accessible and highly useful. They constitute the largest and richest single body of information concerning the problems and operations of industry ever assembled in any nation.

L. C. Marshall,
Director, Division of Review.

9768—6.